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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

SAIPAN HOTEL CORPORATION
dba HAFADAI BEACH HOTEL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, and for other purposes,* is the agreement that delineates the political relationship between the Commonwealth of the Northern Mariana Islands and the United States, and sets forth the powers retained by each government thereunder. The questions presented are:

1. Whether the National Labor Relations Act should be applied to nonimmigrant alien contract workers in the Commonwealth of the Northern Mariana Islands if the policy, procedures and remedies provided thereunder conflict with applicable immigration laws.

2. Whether the National Labor Relations Board may expand its jurisdiction by interpreting commonwealth immigration laws in a manner that enables the Board to control the employment of individuals otherwise subject to the plenary immigration authority of the Commonwealth of the Northern Mariana Islands as agreed to by Congress in the Covenant.

LIST OF PARTIES

Petitioner is Saipan Hotel Corporation, dba Hafadal Beach Hotel. Respondent is the National Labor Relations Board. Intervenor in the case below, reported at 114 F.3d 994, is the Hotel Employees & Restaurant Employees Union, Local 5, AFL-CIO.

RULE 29.6

The parent company of petitioner Saipan Hotel Corporation dba Hafadai Beach Hotel is Pacific Development, Inc. Petitioner has no non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Saipan Hotel Corporation dba Hafadai Beach Hotel (Hafadai) respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in related, but non-consolidated, cases.

OPINIONS BELOW

The opinion of the court of appeals is reported at 114 F.3d 994 (App. 1-14), and involves a review of the decision and order of the National Labor Relations Board (NLRB) reported at 320 N.L.R.B. No. 24. The memorandum opinion of the court of appeals (App. 15-20), which is not reported, involves a review of the decision and order of the NLRB reported at 321 N.L.R.B. No. 17.

JURISDICTION

The court of appeals entered its judgments on June 12, 1997. Timely petitions for rehearing were denied by the appellate court on July 28, 1997. (App. 148-151). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The following authorities are reproduced in the appendix:

1. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, and for other purposes, Pub. L. No. 94-241, 90 Stat. 263, *reprinted* in 48 U.S.C. § 1681 note, Articles I, II, III, IV, V and IX. (App. 152-168).

2. National Labor Relations Act § 1, 29 U.S.C. § 151. (App. 169-170).

3. Nonresident Workers Act, Title III, div. 4, chap. 4, sections 4411- 4414 and 4431-4447 of the Commonwealth of the Northern Mariana Islands Code. (App. 171-206).

STATEMENT OF THE CASES

This Petition seeks review of two cases arising in the Commonwealth of the Northern Mariana Islands (CNMI). The central issue in both cases is whether the National Labor Relations Act (NLRA) should be applied to nonimmigrant alien contract workers (nonresidents)[1] in the CNMI. The National Labor Relations Board (NLRB) claims jurisdiction over nonresidents and contends that its policies and orders preempt any local laws in conflict with the NLRA. The CNMI Department of Labor (CNMI-Labor) contends that it has jurisdiction over nonresidents

[1] The term "nonresident" is used in the CNMI to refer to nonimmigrant alien contract workers. CNMI residents attaining U.S. citizenship by virtue of the Covenant, other United States citizens, and citizens of the former United Nations Trust Territories of the Pacific Islands living in the CNMI are referred to as "residents." See 3 CMC § 4412(i) & (n). (App. 173-174).

under the Nonresident Workers Act (NWA),[2] pursuant to its immigration authority vested in the CNMI under the terms of the *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, and for other purposes* (Covenant). Joint Resolution of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. § 1681 note. The proceedings below have failed to resolve this dispute.

I. BRIEF HISTORY OF THE CNMI

The Northern Mariana Islands (NMI) are located in the western Pacific Ocean, just north of the United States territory of Guam. After World War II, the NMI emerged from Japanese occupation to become part of the Trust Territory of the Pacific Islands (TTPI), which was administered by the United States pursuant to a Trusteeship Agreement with the United Nations Security Council. The Trusteeship Agreement required the United States to promote the development of the TTPI toward self-government or independence.

While other Micronesian islands chose a status of "free association" with the United States, the NMI sought a closer political relationship. In 1976, negotiations culminated in an agreement which was ratified by joint resolution in Congress, unanimously endorsed by the NMI legislature, and approved by a plebiscite in the NMI. The

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[2] The NWA is codified in Title III, division 4 (Immigration and Naturalization), chapter 4 of the Commonwealth Code (CMC). 3 CMC §§ 4411-4414 and 4431-4447 (Supp. 2-88). (App. 171-206).

agreement between the United States and the people of the NMI is embodied in the Covenant. Under the terms of section 503(a) of the Covenant (App. 163), the United States Congress agreed to the CNMI's continued control over immigration which the NMI had been exercising as part of the TTPI. Pursuant to its immigration authority, the CNMI enacted the Nonresident Workers Act: (1) to ensure that residents be given preference in employment; (2) to meet the need for alien labor for continued economic development; and (3) to regulate employment of nonresident workers in order to ensure a balanced and stable economy. See Nonresident Worker Act, Title II, div. 4, chap. 4, section 4411. (App. 171-172).

II. ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

The cases below commenced when two unions filed a joint petition for representation with the NLRB, seeking to become the exclusive bargaining representative for resident and nonresident employees of Hafadai. Hafadai responded that the NLRB could not exercise jurisdiction over the nonresident workers because the NLRA is irreconcilable with the CNMI's sovereign authority over immigration and that the Covenant, therefore, prevents the NLRA from applying to nonresidents. After an extensive hearing, the Regional Director of the NLRB decided that: (a) nonresidents fall within the general definition of "employee" under the NLRA; (b) this Court had already determined in *Sure-Tan v. NLRB*, 467 US 883 (1984), that alien workers employed in the United States are covered

under the NLRA; (c) nothing in the NWA or the regulations promulgated thereunder would impede an employer from engaging in meaningful bargaining; and (d) residents and nonresidents could be included in the same bargaining unit. Accordingly, the Regional Director directed an election be held. (App. 89-147). The NLRB refused Hafadai's subsequent request for review of the Regional Director's decision. (App. 88).

While the representation case was being processed, a series of unfair labor practice charges were filed with the NLRB which alleged, *inter alia*, that Hafadai violated the NLRA by failing to continue the employment of nonresidents whose temporary employment contracts had expired. The charges were consolidated into a single unfair labor practice complaint and processed separately from the representation case.

Cross-motions for injunctive relief also were initiated in the federal district court by Hafadai and the NLRB. Without ruling on whether the Covenant vested ultimate control over nonresident workers with the NLRB or the CNMI, the district court granted the NLRB's request for an order compelling Hafadai to reinstate nineteen nonresident workers whose nonresident employment contracts had expired under CNMI law. However, the district court specifically did *not* order Hafadai to hire Vicente Perez, a nonresident denied hire by Hafadai because the position he sought had been filled by a resident. Pursuant to the federal district court's order, Perez was placed on a preferential list from which he would be hired only in the

event no qualified resident workers applied for the position. (App. 23-55).[3]

Because the dispositive issue in the unfair labor practice case was the same important jurisdictional issue raised in the representation case, Hafadai and counsel for the NLRB stipulated to adopt the evidentiary record of the representation case as the record in the unfair labor practice case, forego litigation of the merits of the unfair labor practice charges, and allow the NLRB an opportunity to opine on the jurisdictional issue under the Covenant. However, rather than addressing the jurisdictional issue, the NLRB ruled on the merits of the unfair labor practice charges and ordered Hafadai, *inter alia*, to "rehire" nonresident Perez despite the fact that a resident had been hired to fill the position. (App. 58-83).

III. THE DECISIONS BY THE NINTH CIRCUIT COURT OF APPEALS

On appeal, Hafadai continued to argue that the NLRB lacked jurisdiction to regulate nonresident workers in the CNMI because the Covenant grants the CNMI complete sovereignty over immigration matters, such that

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[3] A second proceeding for injunctive relief was initiated when CNMI-Labor refused to issue work authorizations for the nineteen nonresident workers the federal district court had ordered Hafadai to reinstate. The district court ordered Hafadai, the NLRB, and the CNMI to negotiate a resolution of any conflicts between the NLRA and the NWA. (App. 56-57, 207-243). The negotiations never concluded, however, and the district court dismissed the case without prejudice when the administrative cases reached the Ninth Circuit Court of Appeals.

conflicting federal laws must yield. The NLRB maintained that the applicability of the NLRA to nonresidents was purely a definitional issue of "employee" under the NLRA. In two separate[4] opinions filed on June 12, 1997, one published and one unpublished, the Ninth Circuit denied Hafadai's appeal and enforced the NLRB's orders.

The published decision, *Saipan Hotel Corp. v. NLRB*, 114 F.3d 994 (CA9 1997) (*Hafadai I*), issued in the representation case, did not address the jurisdictional issue raised by Hafadai under the Covenant. The court treated the case as a jurisdictional challenge under the terms of the NLRA and agreed with the NLRB's argument that the agency had jurisdiction over nonresidents because the NLRA does not distinguish between residents and nonresidents. The court also agreed with the NLRB's argument that there is no conflict between the NWA and the NLRA, citing *Sure-Tan* in support of this conclusion. After deferring to the NLRB's interpretation of the NWA, as well as the NLRB's conclusion that nonresidents and residents could be combined in the same bargaining unit, the court of appeals granted enforcement of the NLRB's order that Hafadai bargain with the unions. *Hafadai I*, 114 F.3d 994. (App. 1-14).

In the unpublished decision, *Saipan Hotel Corp. v. NLRB*, Nos. 96-70403, 96-70483 (CA9 June 12, 1997) (mem.) (*Hafadai II*), issued in the unfair labor practice cases, the court agreed with the NLRB's argument that its remedial reinstatement order did not require Hafadai to

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[4] Petitioner's request for consolidation of the cases was denied. (App. 21-22).

violate CNMI law. The court also rejected the argument, raised by *amicus curiae* Saipan Portopia Hotel Corporation dba Hyatt Regency Saipan, that an award of back pay to the nonresidents violated this Court's holding in *Sure-Tan*. The appellate court ordered Hafadai to reinstate with back pay all of the nonresident workers, including Perez. (App. 15-20). However, the court also stated in closing:

> Although we hold that the remediation the NLRB ordered in this case did not violate the CNMI's immigration law, we do note that potential for conflict does exist between some remedies available under the NLRA and the CNMI's immigration law and policies. The NLRB should be careful, as it apparently was in this case, to respect the CNMI's sovereign control over its immigration matters.

Hafadai II at 6. (App. 20).

This closing paragraph immediately sparked a dispute between the CNMI and the NLRB over the meaning of the decisions. (App. 246-256). Hafadai filed a request for rehearing and a suggestion for rehearing en banc on July 2, 1997, which were denied on July 28, 1997. (App. 148-152).

REASONS FOR GRANTING THE WRIT

This case presents an important legal question regarding whether the National Labor Relations Act applies to nonimmigrant alien contract (nonresident)[5]

[5] See note 1 for the definition of nonresident.

workers in the Commonwealth of the Northern Mariana Islands (CNMI), even though such application would violate *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, and the explicit congressional policies embodied in the Covenant between the United States and the CNMI. In enacting the Covenant, Congress agreed that the CNMI would continue the immigration authority the NMI had been exercising as part of the TTPI. The native people of the Northern Mariana Islands insisted upon the inclusion of this provision in the Covenant between the United States and the people of the Northern Mariana Islands as a condition of entering into the political union.

The centerpiece of the CNMI's efforts to control immigration pursuant to its immigration authority under section 503(a) of the Covenant (App. 163) is the NWA. Under the NWA, employers are able to hire nonresident workers only when resident workers are unavailable. Moreover, nonresidents may be employed only on a temporary basis. To this end, the Commonwealth itself must approve the renewal of employment contracts of each nonresident worker every year. Thus, although the CNMI permits nonresidents to become temporary members of its workforce, it strictly regulates and limits the terms and conditions of such employment.

The NLRB and the Ninth Circuit completely disregarded the pivotal role that the NWA plays in effectuating the CNMI's immigration policy. Instead, the court below upheld the application of the NLRA to nonresident workers in the CNMI despite palpable conflicts between the NLRA and the NWA. Because of these conflicts, the Ninth's Circuit's overly expansive interpretation of the NLRA was plainly inconsistent with this Court's decision

in *Sure-Tan*. In *Sure-Tan*, this Court held that the NLRB's definition of "employees" applied to undocumented aliens only because there was no conflict between the NLRA and applicable immigration laws. This Court also invalidated the award of back pay to, and t[illegible] reinstatement of, workers who were "not lawfully entitled to be present and employed in the United States." *Sure-Tan*, 467 US 883, 903.

In the cases below, however, the Ninth Circuit interpreted the NLRA in an overly broad manner and upheld remedies to workers who were physically present in the CNMI, but were not "available" for work. Although the Ninth Circuit's interpretation of the NLRA plainly cannot be reconciled with this Court's decision in *Sure-Tan*, the courts of appeals have split on the issue of whether undocumented workers may receive back pay under the NLRA and other federal statutes even when they are not legally available for work. This Court should review this case to clarify its holding in *Sure-Tan* and to resolve the conflict in the circuits on the proper application of remedial relief under federal employment laws.

The decisions below also are in error because the court interpreted the NLRA in an unduly broad manner that violates Congress' clear intent as expressed in the Covenant. In considering the scope of the NLRA, the Ninth Circuit misconstrued the relevant issue as whether nonresident workers in the CNMI are "employees" under the NLRA. However, because of the CNMI's plenary authority over immigration matters, the court below should have framed the dispositive issue as whether Congress' specific decision to confer to the CNMI exclusive supervision and control over immigration – and thus over

nonresident workers – will prevail over the NLRA's general coverage of all "employees." By broadly interpreting the NLRA to apply to nonresident workers, the Ninth Circuit failed to adhere to fundamental canons of statutory construction.

The court below compounded this error by conferring substantial deference to the NLRB's interpretation of the CNMI's immigration laws. Resolution of the issues presented depends not upon an interpretation of the NLRA but upon the Congressional determinations embodied in the Covenant. Clearly, the NLRB has no expertise relating to this later Congressional enactment, nor has it been charged with administering the Covenant or the NWA. Accordingly, the Ninth Circuit has departed from the principle that courts should not defer to an agency's construction of a statute that it has not been charged with administering. This Court should resolve this conflict and provide guidance on the extent to which courts should defer to agency interpretations of statutes outside their limited area of expertise.

I. APPLICATION OF THE NATIONAL LABOR RELATIONS ACT TO NONRESIDENT WORKERS IN THE CNMI VIOLATES *SURE-TAN* AND CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE INTERPRETATION OF *SURE-TAN*

A. Unlike the Immigration Law in *Sure-Tan*, the Nonresident Worker Act is Irreconcilable with the National Labor Relations Act

This Court has on one occasion addressed whether the policies and protections of the NLRA should be

extended to nonimmigrant alien workers in the United States, in light of applicable immigration laws. *Sure-Tan, Inc. v. NLRB*, 467 US 883. In *Sure-Tan*, this Court found that application of the NLRA to undocumented aliens did not conflict with the then-current Immigration and Nationality Act (INA) since the

> INA evinces at best evidence of a peripheral concern with employment of illegal entrants. For whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization. . . . Moreover, Congress has not made it a separate criminal offense for an alien to accept employment after entering this country illegally. . . . Since the employment relationship between an employer and an undocumented alien is hence not illegal under the INA, there is no reason to conclude that application of the NLRB to employment practices affecting such aliens would necessarily conflict with the terms of the INA.

Sure-Tan, 467 US 883, 892-93 (internal citations and quotations omitted).

In the cases below, the Ninth Circuit brushed aside Hafadai's request that the court conduct a *de novo* review of the conflict between the NLRA and the CNMI's immigration law, and misconstrued *Sure-Tan* to hold that the NLRA is *per se* compatible with CNMI immigration law. The CNMI immigration law at issue in the cases below is the NWA, which is the manifestation of Congressional policy on immigration in the Commonwealth. When the Covenant was enacted, Congress expressly delegated to

the CNMI exclusive authority over matters relating to immigration. The native people of the NMI insisted upon the inclusion of this provision in the Covenant as a condition of their entering into a political union with the United States to ensure the preservation of their culture and heritage. See, e.g., *Tran v. CNMI*, 780 F. Supp. 709, 713 (D.N.M.I. 1991) ("For reasons including the population and size disparity between the CNMI and the rest of the U.S. and preservation of the CNMI's unique Chamorro and Carolinian ethnic and cultural heritage, the CNMI has been permitted to exercise plenary authority over its own immigration."), *aff'd*, 993 F.2d 884 (CA9 1993).

The centerpiece of the Commonwealth's efforts to control immigration pursuant to its authority under section 503(a) of the Covenant is the NWA. This measure attempts to balance the competing concerns that underlie the CNMI's immigration policies – namely, the need for nonresident labor to support a viable economy versus the need to preserve the native culture and heritage. The NWA achieves this balance through a comprehensive scheme which mandates that resident workers be given preference over nonresident workers.

Under the NWA, employers are able to hire nonresident workers if and only if there are no minimally qualified resident workers who apply for the posted position. Moreover, nonresident workers may be employed only on a *temporary* basis. (App. 106). To this end, the CNMI itself must approve the renewal of the employment contracts of each nonresident worker every year. See Decision and Direction of Election. (App. 13). See also Brief for the National Labor Relations Board at 10, *Saipan Hotel Corp. v.*

NLRB, 114 F.3d 994 (CA9 1997) (Nos. 96-70076, 96-70198) (*NLRB Brief*). Thus, although the CNMI permits nonresidents to become temporary members of its workforce, it strictly regulates and limits the terms and conditions of such employment. (App. 171-172).

This NWA preference for resident workers is irreconcilable with the policies of the NLRA in a number of ways that are dramatically illustrated in the present cases. Three stark conflicts between the NLRA and the NWA presented themselves below. First, the NLRB combined Hafadai's resident and nonresident workers into a single unit for purposes of collective bargaining based on its conclusion that resident and nonresident workers share the same "community of interests". This conclusion is patently at odds with the resident preference inherent in the NWA. See NWA, 3 CMC §§ 4411(a) and 4413. (App. 171, 175).

Second, as acknowledged by the NLRB, application of the NLRA to nonresidents would enable nonresident workers to bargain for permanent employment in contravention of their status as temporary workers under the NWA.[6] This result would clash directly with the NWA requirements that nonresident employment contracts be limited to one year. See Decision and Direction of Election. (App. 13). See also *NLRB Brief* at 10.

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[6] The NLRB admits the irreconcilability of the NLRA and the NWA by acknowledging that "the duration of a contract is itself a mandatory subject of bargaining" and that any limitation on such bargaining by the CNMI "would be an impermissible intrusion . . . and would therefore be preempted." *NLRB Brief* at 55.

Third, the NLRB reinstatement order in *Hafadai II* is irreconcilable with the resident preference under the NWA. In the case of nineteen of these nonresident workers, their temporary employment contracts had expired under CNMI law. In the case of Perez, his application for employment was rejected because the position he applied for was filled by a resident worker.[7] See generally Amicus Brief of the Commonwealth of the Northern Mariana Islands at 4, *Saipan Hotel Corp. v. NLRB*, 114 F.3d 994 (CA9 1997) (Nos. 96-70076, 96-70198) (*CNMI Amicus*).

The court below nevertheless upheld the NLRB's "reinstatement" order, even if it meant that Hafadai would be required to: (a) offer a substantially similar position or create a new position for each nonresident; *and*, (b) at the same time, offer that position to each and every qualified resident applicant until the entire resident pool was exhausted. This remedy was deemed a "workable solution" by the court below.[8] This solution, however, undermines the policy of

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[7] The NLRB "reinstatement" demand for Vicente Perez so fundamentally violates the CNMI's plenary authority over immigration that even the federal district court in the first injunction proceeding chose instead to place Perez on a preferential list from which he would be hired only if no qualified resident worker applied for the position. (App. 58-83)

[8] The "double-hire" situation was deemed not to work an undue hardship on Hafadai because "it should not have discriminated against the workers in the first instance." *Hafadai II* at 4-5. This finding is particularly disturbing because: (1) pursuant to stipulation, unfair labor practices were never established nor litigated on the merits; and (2) it is common for nonresidents to assert unfair labor practices upon the expiration of their one-year contracts, so that they may remain in the CNMI pending resolution of their claims.

limiting the number of nonresident workers in the CNMI, and punishes the employer for complying with commonwealth policies. Indeed, the CNMI is gravely concerned that the NLRB's remedial schemes will nullify the CNMI's plenary authority over immigration. See generally *CNMI Amicus.*

B. The Remedial Relief Granted by the Ninth Circuit Violates *Sure-Tan* And Conflicts With Other Circuit Court Interpretations Of *Sure-Tan*

In the decision below in *Hafadai II*, the court of appeals upheld the NLRB's order of reinstatement and back pay to nonresidents whose temporary employment contracts had expired and who consequently had no authorization to be present or employed in the CNMI. The remedial relief mandated by the court of appeals thus conflicts with this Court's holding in *Sure-Tan* and conflicts with the decisions of other courts of appeals in their interpretations of *Sure-Tan*.

In *Sure-Tan*, this Court reversed certain remedial provisions of the NLRA as applied to undocumented aliens who had voluntarily left the United States, since the remedies failed to "take into account another equally important Congressional objective, to wit, the objective of deterring unauthorized immigration." *Sure-Tan*, 467 US 883, 903 (internal citations and quotations omitted). This decision thus stands for the proposition that the NLRA should not apply where there is a conflict with another specific congressional enactment. In the cases below, the CNMI's exclusive jurisdiction over its immigration policy is just such a congressional enactment. Rather than heeding this admonition, the NLRB improperly extended its

jurisdiction to workers who were not "lawfully entitled to be present and employed." *Id.*

In spite of the clarity with which this limitation on the scope of the NLRA was articulated in *Sure-Tan*, the courts of appeals have split on how that decision should be applied to undocumented workers who are present in the United States, under circumstances where the main concern is unauthorized employment, and not illegal entry. The applicability of *Sure-Tan's* remedial holding is the source of circuit court confusion in light of the subsequent enactment of the 1986 Immigration Control and Reform Act (IRCA), which significantly amended United States immigration laws by imposing sanctions to penalize employers who hire unauthorized aliens.

The conflicting approaches among the circuits following *Sure-Tan* involve the remedies imposed under federal statues including the NLRA, the Fair Labor Standards Act (FLSA), and Title VII of the Civil Rights Act of 1964 (Title VII). Some courts of appeals have adopted an artificially narrow interpretation of *Sure-Tan* by allowing back pay and reinstatement so long as workers are physically present in the United States, without regard to authorization conferred by applicable immigration laws. These decisions essentially hold that this Court's "lawfully entitled to be present and employed in the United States" eligibility requirement in *Sure-Tan* was fashioned merely to avoid a remedy that would require illegal entry into the United States, as opposed to establishing authorized employment as a prerequisite to remedial relief.[9]

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[9] See, e.g., *Rios v. Enterprise Ass'n Steamfitters Local 638*, 860 F.2d 1168 (CA2 1988) (holding that undocumented aliens who

The Ninth Circuit continues to adhere to this restrictive interpretation of *Sure-Tan*. For example, it sustained an arbitrator's remedy of reinstatement with back pay under the provisions of a collective bargaining agreement, specifically holding that *Sure-Tan* did not prohibit the reinstatement remedy for an undocumented worker lacking employment authorization. *Belves Co., Inc. v. Teamsters Local 986*, 791 F.2d 1391 (CA9 1986). The Ninth Circuit's decision to affirm the NLRB's order of reinstatement and back pay for the nonresident workers in *Hafadai II* is simply the most recent example of the Ninth Circuit's narrow interpretation of *Sure-Tan* to require only that an alien worker be physically present to be eligible for remedial relief.

In contrast, the Seventh Circuit (which, notably was the court of appeals below in *Sure-Tan*) has recognized the significance of IRCA, and has interpreted *Sure-Tan* to

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remain in the country are entitled to back pay under Title VII); *In re Reyes*, 814 F.2d 168, 170 (CA5 1987) (noting that "it is well established that the protections of the [FLSA] are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant"), *cert. denied*, 487 US 1235 (1988); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (CA9 1989) (holding that Title VII remedies apply to undocumented workers); *Local 512, Warehouse and Office Workers Union v. NLRB*, 795 F.2d 705 (CA9 1986) (holding that undocumented workers not found deportable by the INS are entitled to backpay when their NLRB rights are violated); accord *NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d 74 (CA9 1987) (citing *Local 512* for support), *cert. denied*, 501 US 1217 (1991); *Patel v. Quality Inn South*, 846 F.2d 700 (CA11 1988) (holding that an undocumented worker may bring action for unpaid wages and liquidated damages under the FLSA).

allow remedial relief only where the worker has employment authorization under the applicable immigration law. See *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (CA7 1992) (citing *INS v. Lopez-Mendoza*, 468 US 1032 (1984) as support for its interpretation of *Sure-Tan*, and denying prospective relief); accord *NLRB v. Intersweet, Inc.*, No. 96-3528, 1997 WL 590091 (CA7 Sept. 17, 1997). Additionally, the Second Circuit, relying on the reasoning of *Del Rey* and *Sure-Tan*, recently recognized that "application of prospective labor law remedies to undocumented aliens consistently has been dependent upon whether the alien is permitted by the INS to remain in the United States." *Montero v. INS*, No. 1512, docket 96-4130, 1997 WL 534508, at *3 (CA2 Aug. 28, 1997) (conditioning reinstatement on the employee's presentation of documentation showing eligibility for employment).

Clarification of the proper interpretation of *Sure-Tan* will provide a consistent framework for determining the applicability of remedies under the NLRA, the FLSA, Title VII and other federal statutes in light of applicable immigration laws.

II. THE NINTH CIRCUIT'S DEFERENCE TO THE NATIONAL LABOR RELATIONS BOARD'S INTERPRETATION OF IMMIGRATION LAW VIOLATES *CHEVRON* AND CONFLICTS WITH OTHER CIRCUIT COURT INTERPRETATIONS OF *CHEVRON*

The CNMI was established in 1976 by virtue of a negotiated Covenant, ratified by joint resolution in Congress, unanimously endorsed by the Northern Marianas legislature, and approved by 78.8% of plebiscite voters.

See Covenant (App. 152-154). Section 503(a) of the Covenant reflects Congress's recognition of the CNMI's reserved sovereign power to regulate immigration and naturalization. (App. 163). Section 502(a)(2) provides that federal laws of general applicability are applicable to the CNMI to the extent they are applicable to Guam and the several states. (App. 162-163). Section 504 provides the methodology to determine whether other nonenumerated federal laws (in existence at the time the Covenant was enacted) are applicable in the CNMI, and to what extent. Section 504 establishes a Commission on Federal Laws (Commission) to make recommendations to Congress as to the applicability or inapplicability of federal laws to the CNMI. (App. 164). To date, Congress has not made the NLRA expressly applicable in the CNMI nor has the Commission recommended the NLRA be made expressly applicable.

The Ninth Circuit's decisions in *Hafadai I* and *Hafadai II* interpreted the NLRA in an unduly broad manner that violates Congress' clear intent as expressed in the Covenant. In considering the scope of the NLRA, the Ninth Circuit misconstrued the dispositive issue as whether nonresident workers in the CNMI are "employees" under the NLRA. But for the CNMI's immigration authority as manifested in the NWA, the Ninth Circuit's question would have been correct. The dispositive issue, however, is whether Congress' specific recognition of the CNMI's exclusive supervision over immigration – and thus nonresident workers – overrides the NLRA's general coverage of "employees." The answer to this question required the Ninth Circuit to conduct a *de novo* review of the

Covenant as the ultimate expression of Congressional intent with respect to the CNMI.

Because it misconstrued the dispositive issue in the cases below, the court of appeals improperly deferred to the NLRB's disregard of the CNMI's carefully crafted immigration policy and its interpretation of the Covenant and the NWA. See *Hafadai I*, 114 F.3d 994, 996. (App. 1, 8-9). Such deference was improper, especially in light of *Sure-Tan*, wherein this Court deferred to the NLRB's determination that undocumented aliens were statutory "employees" only because it had determined, *de novo*, that the NLRA did not conflict with applicable immigration laws. In failing to conduct a *de novo* review, the Ninth Circuit accorded the NLRB the substantial deference that this Court concluded should be applied to agency determinations of its own regulations. See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron*, this Court reversed the court of appeals judgment which set aside the Environmental Protection Agency's promulgation of regulations defining the term "stationary source" as contained in the Clean Air Act Amendments of 1977. This Court held that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 US 837, 844.

Since the *Chevron* case was decided, courts of appeals have split in their interpretation of *Chevron*'s proper level of deference. Consistent with the Ninth Circuit's decisions below, "[s]ome have argued for an expansive reading of the *Chevron* decision that would apply broadly

enough to require deference to almost any agency interpretation,[10] . . . [h]owever, . . . the post *Chevron* case law and most commentators do not believe this extension to be warranted." *Johnson City Medical Ctr. v. United States*, 999 F.2d 973, 980 (CA6 1993) (holding that *Chevron* requires only that courts show substantial deference to an agency's own *regulations*). The Court of Appeals for the District of Columbia followed this Court's common-sense approach in *National Treasury Employees Union v. Federal Labor Relations Auth.*, stating, "Although we must give considerable deference to the Authority's construction of its enabling statute, we need not defer to its interpretations of other statutes . . . or to its construction of regulations promulgated by other agencies[.]" *National Treasury*, 848 F.2d 1273, 1275 (1988) (citations omitted). Additionally, the Court of Appeals for the Third Circuit gave considerable deference to the Federal Labor Relations Authority's reading of the Federal Labor-Management Statute, but did not grant any presumption of special expertise in applying the Privacy Act or the Freedom of Information Act, of which it had no special competence. *United States Dept. of Navy v. Federal Labor Relations Auth.*, 840 F.2d 1131, 1134 (CA3 1988) (noting that even when a

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[10] See, e.g., *Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310 (CA7 1987) (holding that district court's determination that provisions of the Commodity Exchange Act were unconstitutional failed to adhere to the standard of deference enunciated by the Court in *Chevron*); *Grinspoon v. Drug Enforcement Admin.*, 828 F.2d 881 (CA1 1987) (applying *Chevron* deference to the Drug Enforcement Agency Administrator to interpret portions of the Controlled Substances Act and refraining from imposing the court's own statutory interpretation upon the agency).

particular deference is owed to the agency because of its expertise, courts must not "rubber stamp" administrative decisions that are inconsistent with a statutory mandate or that frustrate a statutory policy).[11]

In contrast, the court below deferred completely to the NLRA's interpretation of the CNMI's immigration laws. Obviously, there is no justification for judicial deference where an agency has no substantive experience or expertise in interpreting a particular statutory scheme. To the extent that there is confusion concerning this issue, this Court should grant *certiorari* to resolve this inter-circuit conflict regarding the appropriate deference to be accorded to a federal agency's interpretation of a statute other than the statute it is authorized to administer.

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[11] Other circuits agree that, under certain circumstances, deference should be applied narrowly. See, e.g., *Lynch v. Lyng*, 872 F.2d 718, 724 (CA6 1989) (the amount of weight accorded an agency interpretation diminishes further when the interpretation does not require special knowledge within the agency's field of technical expertise); *Colorado Public Utilities Comm'n v. Harmon*, 951 F.2d 1571, 1579 (CA10 1991) (concluding that although courts should defer to the judgment of an administrative agency with reference to topics within the agency area of expertise, a preemption determination involves matters of law – an area more within the expertise of the courts); *Mid Louisiana Gas Co. v. Federal Energy Regulatory Comm'n*, 780 F.2d 1238, 1243 (CA5 1986) (although there may be room to defer to the views of an agency where the understanding of the problem is enhanced by the agency's expert understanding of the industry, agency decisions on contract construction are not conclusive, and no deference is necessary).

III. THE NINTH CIRCUIT ENABLED THE NATIONAL LABOR RELATIONS BOARD TO IMPERMISSIBLY EXPAND ITS JURISDICTION IN A MANNER WHICH ABROGATED CONGRESSIONAL POLICY EMBODIED IN A COMMONWEALTH LAW

The Ninth Circuit decisions below have led to an unprecedented and unacceptable result: A federal agency has been allowed to dictate immigration policy for a commonwealth in violation of a Congressional mandate. This is the precise result the CNMI opposed in its *amicus* brief to the Ninth Circuit:

> The Commonwealth urges this Court to find that it was – and that it will continue to be – an abrogation [of the Commonwealth's retained right to legislate and administer immigration laws and policies] absent a ruling that the NLRA may not be applied in the CNMI in a way that infringes upon the Commonwealth's rights with respect to immigration or that otherwise guarantees that the NLRA cannot be used as a vehicle for effecting a change in immigration status. . . . [T]he Commonwealth is concerned that the larger issue – abrogation of its jurisdiction over local immigration concerns – has gotten lost.

CNMI Amicus at 11.

The Ninth Circuit's misconstruction of the dispositive issue and its inappropriate deference to the NLRB are at odds with well-established precedents for determining

applicability of federal laws in commonwealths.[12] The court below accepted the NLRB's treatment of the NWA, not as a manifestation of Congressional intent on equal footing with the NLRA, but as something far less.[13]

The fact that the Covenant embodies an agreement between Congress and the CNMI should have alerted the Ninth Circuit to examine the Covenant as the controlling document delineating the powers of the two political

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[12] See, e.g., *CNMI v. Atalig*, 723 F.2d 682 (CA9), (Covenant restrictions on right to jury trial did not violate Sixth and Fourteenth Amendments), *cert. denied*, 467 US 1244 (1984); *Micronesian Telecommunications, Corp. v. NLRB*, 820 F.2d 1097 (CA9 1987) (deferring to the "findings" of the Commission on Federal Laws to determine NLRB application in the CNMI); *Ngiraingas v. Sanchez*, 858 F.2d 1368, 1371 n.1 (CA9 1988) (distinguishing the political status of the CNMI from that of Guam, noting that "Guam's relation to the United States is entirely different"), *aff'd*, 495 US 182 (1990); *A&E Pacific Construction Co. v. Saipan Stevedore Co., Inc.*, 888 F.2d 68 (CA9 1989) (construing Covenant to determine whether Shipping Act of 1984 applies to CNMI); *Wabol v. Villacrusis*, 958 F.2d 1450 (CA9), (land alienation restrictions did not violate equal protection), *cert. denied*, 506 US 1027 (1992); *United States v. De Leon Guerrero*, 4 F.3d 749 (CA9 1993) (examining whether the Insular Areas Act conflicts with the self-governance provisions of the Covenant); *United States v. Quinones*, 758 F.2d 40, (CA1 1985) (examining the historical-judicial basis of the Puerto Rican Constitution to determine whether the Omnibus Crime Control Act applied to the commonwealth); *United States v. Lopez Andino*, 831 F.2d 1164 (CA1 1987) (examining the Puerto Rican Federal Relations Act to determine applicability of federal civil rights statutes).

[13] Hafadai's position has been that the Covenant is more than an Act of Congress, approaching treaty-like status. For purposes of this Petition, however, it is sufficient to treat the Covenant as a federal statute.

entities. While the court below had on previous occasions understood the import of the governing document establishing the relationship between the United States and the CNMI,[14] it failed to do so in the cases below, and in so failing, abandoned the approaches used by other courts of appeals in determining the applicability of federal laws in commonwealths. See, e.g., *United States v. Quinones*, 758 F.2d 40 (CA1 1985) (after examining the compact between the people of Puerto Rico and the United States, the court concluded that Congress cannot amend the Puerto Rico Constitution unilaterally); *United States v. Sanchez*, 992 F.2d 1143 (CA11 1993) (court examined history and formation of the Commonwealth of Puerto Rico and held that Puerto Rico is not a separate sovereign for double jeopardy purposes), *as modified*, 3 F.3d 366 (CA11 1993); *Romero v. United States*, 38 F.3d 1204 (CA Fed 1994) (court reconciled the Puerto Rican Federal Relations Act with a subsequent amendment to the federal tax code to determine if Puerto Rico could withhold taxes from federal employees in Puerto Rico).

The Covenant delineates the extent to which congressional policies may be extended in the CNMI. Any questions regarding the scope of the NLRB's authority may be answered by reviewing the Covenant itself. See, e.g., *United States v. De Leon Guerrero*, 4 F.3d 749, 754 (CA9 1993) ("Even if the Territorial Clause provides the constitutional basis for Congress' legislative authority in the Commonwealth, it is solely by the Covenant that we measure the limits of Congress' legislative power.").

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[14] See, e.g., *supra* note 12.

A plain reading of section 503(a) of the Covenant indicates that the CNMI's authority over immigration is plenary. Alternatively, a section 504 analysis of the Commission's recommendations would reveal that the NLRA should not be made applicable to nonresidents. Lastly, even an application of fundamental statutory construction principles would reveal that the general provisions of section 502(a)(2) should yield to the specific provisions of section 503(a); or that a later-enacted, specific statute (the Covenant) would prevail over a general statute (the NLRA) enacted long before the Covenant was established. See *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 US 437, 445 (1987). Any level of statutory construction leads to the same result: the Covenant and the NWA must prevail.

In the cases below, the Ninth Circuit's failure to analyze the *Covenant* resulted in inconsistent and ambiguous decisions which failed to resolve the question of which law – the NLRA or NWA – ultimately governs nonresident employment in the CNMI. The dispute between the NLRB and the CNMI over nonresident employment continued even after the court's decisions below because both entities construed the decisions in their favor. (App. 246-256). As a result, Hafadai and other employers in the CNMI are left to struggle, on a case-by-case basis, with irreconcilable policies under the NLRA and the NWA.

Therefore, the important question for this Court is whether the Covenant, the governing document which delineates the distribution of powers between the United States and the CNMI, is the key to determining federal law applicability in the Commonwealth. The decisions

below, which hold that the NLRA applies to nonresident workers, abrogate the immigration power reserved for the CNMI under the Covenant. Allowing the decisions to stand would make the CNMI's plenary authority over immigration, as manifested in the NWA, merely illusory.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAIPAN HOTEL CORP., d.b.a. Hafadai Beach Hotel, *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent,* HOTEL EMPLOYEES & RESTAURANT EMPLOYEES LOCAL 5, *Respondent-Intervenor.*	No. 96-70076 NLRB No. 37-CA-4202 OPINION
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. SAIPAN HOTEL CORP., d.b.a. Hafadai Beach Hotel, *Respondent.*	No. 96-70198 NLRB No. 37-CA-4202

App. 2

Petition for Review and Cross Application
for Enforcement of an
Order of the National Labor Relations Board

Argued and Submitted
May 6, 1997 – Honolulu, Hawaii

Filed June 12, 1997

Before: William A. Norris, Cynthia Holcomb Hall and A. Wallace Tashima, Circuit Judges.

Opinion by Judge Norris

SUMMARY

Labor and Employment/Litigation and Procedure

The court of appeals denied a petition for review of an order of the National Labor Relations Board (NLRB) and granted a petition for enforcement. The court held that the National Labor Relations Act (NLRA) applies to both resident and nonresident workers in the Commonwealth of the Northern Marina Islands (CNMI).

In a collective bargaining dispute between petitioner Saipan Hotel Corp. and respondent Hotel Employees and Restaurant Employees Local 5, the NLRB ordered Saipan Hotel to bargain with the union.

Saipan Hotel contended in its petition for review that the NLRB lacked jurisdiction over nonresident workers in the CNMI. Saipan Hotel asserted that the absence of a provision in the NLRA for distinguishing between classes

of employees conflicted with a provision of the CNMI's Nonresident Workers Act (NWA) that expressly gives preferential treatment to resident workers. Saipan also contended that under the NLRA and *Res-Care, Inc.*, 280 N.L.R.B. (1986), the NLRB typically declines to exercise jurisdiction over employees whose employment conditions are regulated extensively by statutorily exempt government entities.

The NLRB countered that under circuit caselaw, the NLRA applies to the Marianas without excepting any CNMI workers. On appeal, the sole jurisdictional question was whether both resident and nonresident CNMI workers qualify as "employees" under the NLRA. Citing *Management Training Corp.*, 317 N.L.R.B. 1355 (1995), the NLRB also asserted that it may exercise jurisdiction even when political subdivisions like CNMI exert significant control over the terms of workers' employment.

[1] The NLRA provides that the term "employee" includes any employee, with six categorical exceptions that did not apply. All employees who do not fall within the categorical exceptions, even illegal aliens, are covered by the NLRA. [2] The NLRB's construction of terms in the NLRA that establish its jurisdiction must be upheld if it is reasonably defensible. There is no defensible construction of "employee" other than that the term applied to both categories of workers at issue. Given that the NLRA applies to the CNMI and the NLRA does not except nonresident (or alien) employees, the NLRB possessed jurisdiction over both resident and nonresident workers.

[3] Application of the NLRA to the CNMI's nonresident workers did not contravene the statutory preference

for resident workers expressed in the NWA because there is no necessary conflict between the NWA and the NLRA. The NWA's purposes – to protect residents' job security and ensure that nonresidents' employment will not disadvantage residents' wages and working conditions – are essentially the same as the purposes of the United States immigration laws. Bringing alien workers within the ambit of the NLRA ensures that citizen workers' economic interests will be better protected. The concern for creating disincentives to hire aliens who are not legally admitted is the same between legal and nonlegal CNMI workers.

[4] Saipan Hotel could not have relied on the *Res-Care* rule because it is not the kind of employer to which the NLRB has ever applied the rule to decline jurisdiction. Saipan Hotel did not have contracts with the CNMI government and did not receive substantial funding from it. Saipan is a private hotel whose ties to the CNMI government consisted of being subject to the same regulations as every CNMI employer.

[5] The court of appeals generally defers to the NLRB regarding retroactive application of its decisions, absent manifest injustice. Saipan Hotel did not suffer manifest injustice from the application of *Management Training*. Although the CNMI retains significant power to control the terms and conditions of nonresidents' employment, it performs only a perfunctory review. Given the minimal degree to which the CNMI controlled the private employer-employee relationship, it did not work a manifest injustice for the NLRB to assert jurisdiction.

[6] The NLRB's decision regarding bargaining units is rarely to be disturbed. The NLRB need only choose an

appropriate bargaining unit. The shared interests of the resident and nonresident workers justified the NLRB's determination that they should constitute a single bargaining unit.

COUNSEL

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Patrick H. Jones, Marr, Jones & Pepper, Honolulu, Hawaii, for amicus Pacific Management Resource Group.

OPINION

NORRIS, Circuit Judge:

Saipan Hotel Corporation petitions for review of an NLRB order directing it to bargain with the Hotel Employees & Restaurant Employees, Local 5, AFL-CIO (the "Union"). The NLRB cross-petitions for enforcement of its order.

I

Saipan Hotel operates in the Commonwealth of the Northern Mariana Islands ("CNMI"), which is a self-governing commonwealth in political union by covenant with the United States. The hotel employs nonimmigrant alien contract workers, classified as "nonresident" workers, as well as "resident" workers, who include U.S. citizens, persons born in the CNMI, and citizens of the former United Nations Trust Territories of the Pacific Islands.

In this action, Saipan Hotel's principal argument is that the NLRB lacks jurisdiction over nonresident workers in the CNMI. Although we decided in *Micronesian Telecommunications Corporation v. NLRB*, 820 F.2d 1097, 1100 (9th Cir. 1987), that the National Labor Relations Act ("NLRA") applies to the CNMI, we did not address the distinction between CNMI's resident and nonresident workers. *See id.* at 1099 (stating issue as whether NLRB had jurisdiction over "employees," without distinguishing between classes of employees). Saipan Hotel reasons that if the NLRA applies to nonresident

workers as well as to resident workers, NLRB decisions that affect the terms and conditions of nonresident workers' employment would conflict with the CNMI's sovereign control over its immigration matters, as provided in Section 503(a) of the Covenant between the CNMI and the United States.[1] Covenant to Establish a Commonwealth of the Northern Mariana Islands, 48 U.S.C. § 1801 note. In particular, Saipan Hotel complains that the absence of a provision in the NLRA for distinguishing between classes of covered employees irreconcilably conflicts with a provision in the CNMI's Nonresident Workers Act ("NWA"), 3 N. Mar. I. Code § 4413,[2] which explicitly gives preferential treatment to resident workers.

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[1] Section 503(a) provides in pertinent part:

> The following laws of the United States . . . will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement:
>
> (a) except as otherwise provided in Section 506, the immigration and naturalization laws of the United States

Covenant to Establish a Commonwealth of the Northern Mariana Islands, 48 U.S.C. § 1801 note (§ 503(a)).

It is undisputed that the Section 506 exceptions are inapplicable here.

[2] Section 4413 provides:

> Resident workers shall be given preference in employment in the Commonwealth. Nonresident workers shall be employed only as necessary to supplement the available labor force. No employer shall hire, employ, or otherwise engage for

[1] In asserting that it has jurisdiction, the NLRB relies primarily on the *Micronesian Telecommunications* blanket holding that "the 1976 Covenant makes the NLRA applicable to the Marianas," without excepting any CNMI workers. 820 F.2d at 1100. Because Saipan Hotel concedes both that the issues on appeal involve labor disputes and that it is an employer within the meaning of the NLRA, the NLRB articulates the sole jurisdictional question as whether both resident and nonresident CNMI workers qualify as "employees" as defined by the NLRA. Section 2(3) of the NLRA provides that "[t]he term 'employee' shall include any employee," with six categorical exceptions that indisputably do not apply here. 29 U.S.C. § 152(3). All employees who do not fall within those categorical exceptions, even employees who are illegal aliens, are covered by the NLRA. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984). As a result, the NLRB argues that it must have jurisdiction over both resident and nonresident CNMI workers. *See NLRB v. Deaton, Inc.*, 502 F.2d 1221, 1229 (5th Cir. 1975) (individuals who meet statutory definition of "employee" "must be regarded as employees for all purposes").

[2] The NLRB's "construction of terms in the National Labor Relations Act (NLRA) that establish its statutory jurisdiction must be upheld if that construction is 'reasonably defensible.' " *Micronesian Telecom.*, 820 F.2d

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compensation any nonresident worker to perform services or labor in the Commonwealth except in strict accordance with the provisions of this Chapter and any rule or regulation issued under this Chapter.

3 N. Mar. I. Code § 4413.

at 1099-1100 (citation omitted). There is no defensible construction of "employee" other than that the term applies to both categories of workers at issue here. Given that the NLRA applies to the CNMI, *id.* at 1100, and the NLRA does not except nonresident (or alien) employees from its reach, *Sure-Tan*, 467 U.S. at 892, the NLRB necessarily possesses jurisdiction over both resident and nonresident workers. Indeed, the Covenant between the CNMI and the U.S. provides that federal statutes apply to the CNMI "as they are applicable to the several states." Cov. § 502(a)(2). Because the NLRA, as it is applied in the United States, does not distinguish between citizen and alien employees, neither can the NLRA be applied in the CNMI to distinguish between resident and nonresident workers.

[3] Moreover, application of the NLRA to the CNMI's nonresident workers does not contravene the statutory preference for resident workers expressed in the NWA because there is no necessary conflict between the NWA and the NLRA. The NWA's twin purposes – to protect residents' job security by giving them preferences in employment and to ensure that nonresidents' employment will not disadvantage residents' wages and working conditions – are essentially the same as the purposes of the United States' immigration laws. *See Sure-Tan*, 467 U.S. at 893 ("A primary purpose in restricting immigration is to preserve jobs for American workers; immigrant aliens are therefore admitted to work in this country only if they 'will not adversely affect the wages and working conditions of the workers in the United States similarly employed.' ") (quoting 8 U.S.C. § 1182(a)(14)). And as the Court recognized in *Sure-Tan, id.*, bringing alien workers

within the ambit of the NLRA ensures that citizen workers' economic interests will be better protected:

> Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened.

Obviously, the concerns are slightly different between legal nonresident and resident workers in the CNMI as compared to illegal aliens, on the one hand, and legally resident aliens and citizen workers, on the other, in the U.S., but the concern for creating disincentives to hire aliens who are not legally admitted is constant in both situations. The NLRB's exercise of jurisdiction in these cases helps to safeguard, rather than to subvert, that concern.

Because the NLRB's construction of the term "employee" is the only defensible construction of the term, and because application of the NLRA to nonresident workers in the CNMI does not necessarily create a conflict with the NWA, we hold that the NLRA applies both to resident and to nonresident workers in the CNMI.

II

Saipan Hotel next argues that, even if the NLRA covers both resident and nonresident workers in the

CNMI, the NLRB abused its discretion by asserting jurisdiction in this case because the CNMI government so significantly controlled the terms of employment for Saipan Hotel's employees that Saipan Hotel could not meaningfully bargain with its employees independent of the government's direction. Saipan Hotel points to Section 2(2) of the NLRA, 29 U.S.C. § 152(2), which excepts employers that are governmental entities, or political subdivisions, from the NLRA's reach, and notes that, for years, the NLRB has exercised its discretion to similarly except employers whose employment conditions are extensively regulated by these statutorily exempt governmental entities, on the reasoning that these employers cannot effectively bargain with their employees because of that governmental regulation. *See Res-Care, Inc.*, 280 N.L.R.B. 670, 672 (1986) (stating that NLRB typically declined to exercise jurisdiction over employers whose employment conditions were significantly regulated by government entities). Saipan Hotel argues that the *Res-Care* rule should have controlled this dispute as well. And Saipan Hotel complains that the NLRB retroactively applied to these disputes its new rule, articulated in *Management Training Corp.*, 317 N.L.R.B. 1355, 1358 (1995), that it may exercise jurisdiction even where political subdivisions exert significant control over the terms of workers' employment.

[4] Although the NLRB contends that the broader rule in *Management Training* does apply in this case, it also claims it had jurisdiction even under the narrower *Res-Care* rule. Saipan Hotel could not have relied on the *Res-Care* rule when contracting with its employees because Saipan Hotel is not the kind of employer to which the

NLRB has ever applied the *Res-Care* rule to decline jurisdiction. *Compare ARA Serv., Inc. v. NLRB*, 71 F.3d 129, 135-36 (4th Cir. 1995) (denying enforcement of NLRB order retroactively applying *Management Care* rule because employer had relied on *Res-Care* rule when crafting employment agreement). Saipan Hotel did not have contracts with the CNMI government, and Saipan Hotel did not receive substantial funding from the CNMI government. Instead, the NLRB points out that Saipan Hotel "is a private hotel whose 'close ties' with the CNMI government consist solely of being subject to the same government regulations as every CNMI employer." Appellee's Brief at 26. The NLRB declares that it only applied the *Res-Care* rule to employers that did in fact have close ties to government or that received significant funding from government.

[5] In general, we defer to the NLRB regarding retroactive application of its decisions "absent manifest injustice." *NLRB v. Best Prod. Co.*, 765 F.2d 903, 913 (9th Cir. 1985). Saipan Hotel, which could not have relied on *Res-Care* in the first place, did not suffer manifest injustice from the application of *Management Training* to this dispute. Although the CNMI does retain significant power to control the terms and conditions of nonresident employees' employment – nonresident employees must receive yearly authorization to work in the CNMI from the CNMI government, for example, and the CNMI government requires that the nonresident employees not be paid more than resident employees – the NLRB points out that the CNMI actually performs only a perfunctory review. Indeed, Saipan Hotel's director of public relations agreed that CNMI's renewal of nonresident workers'

employment contracts was "fairly routine" unless resident workers applied for the same job. Trans. of Representation Hrg., CR at 307. Given the minimal degree to which the CNMI actually controls the private employer-employee relationship here, and the fact that that minimal degree of control applies to every private employer in the CNMI that employs any nonresident workers, it does not work a "manifest injustice" for the NLRB to assert jurisdiction over these employment relationships.

III

Finally, Saipan Hotel argues that the NLRB should have divided the resident and nonresident workers into separate bargaining units in recognition of the preferential treatment the NWA accords to resident workers. The NLRB responds that the nonresident and resident workers at Saipan Hotel have communal interests because they perform the same work under the same supervisors, are employed under the same job classifications, and receive the same or similar wage rates.

[6] The NLRB's decision regarding bargaining units is "if not final, . . . rarely to be disturbed." *NLRB v. French Int'l Corp.*, 999 F.2d 1409, 1409 (9th Cir. 1993) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)). The NLRB need only choose an appropriate bargaining unit, even if it does not choose the most appropriate such unit. *Id.* Here, the shared common interests of the nonresident and resident workers fully justify the NLRB's determination that they should constitute a single bargaining unit.

Saipan Hotel's petition for review is DENIED and the NLRB's petition for enforcement is GRANTED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAIPAN HOTEL CORP., d.b.a. Hafadai Beach Hotel, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 96-70403 NLRB Nos. 37-CA-3977, 37-CA-3978, 37-CA-3983, 37-CA-4027, 37-CA-4051, 37-CA-4134
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. SAIPAN HOTEL CORP., d.b.a. Hafadai Beach Hotel, Respondent.	No. 96-70483 NLRB Nos. 37-CA-3977, 37-CA-3978, 37-CA-3983, 37-CA-4027, 37-CA-4051, 37-CA-4068, 37-CA-4074, 37-CA-4134

MEMORANDUM*

(Filed Jun. 12, 1997)

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Petition for Review of an
Order of the National Labor Relations Board

Argued and Submitted May 6, 1997
Honolulu, Hawaii

Before: NORRIS, HALL, and TASHIMA, Circuit Judges

Saipan Hotel Corporation petitions for review of an NLRB order directing it to reinstate with backpay certain workers against whom the NLRB found Saipan Hotel to have engaged in a variety of unfair labor practices, such as intimidating employees who engaged in union activity, refusing to allow employees to discuss the terms of their employment with other employees, and firing or refusing to rehire employees who were associated with the union. The NLRB cross-petitions for enforcement of its order.

Saipan Hotel argues principally that the NLRB lacks jurisdiction, but we resolved that issue against Saipan Hotel in a published opinion, filed simultaneously with this memorandum disposition. In the alternative, Saipan Hotel argues that the parties' joint stipulation presented only the jurisdictional issues for decision, which would mean that the merits of the unfair labor practices charges are not before us. The NLRB responds that Saipan Hotel's refusal to defend on any ground other than jurisdiction functioned as an effective admission of the factual allegations in the complaint.

The joint stipulation, ER 2136-40, shows that the parties presented the merits of the labor dispute, as well as the jurisdictional question, before the NLRB. The stipulation provides that it, and the exhibits it described, "shall constitute the entire record in this case, and no oral testimony is necessary or desired by any of the parties."

ER 2139. Next, the stipulation states that Saipan Hotel withdrew its answer to the complaint, with the exception of its defenses relating to the NLRB's assertion of jurisdiction. *Id.* Later, the stipulation states that "[t]he Respondent [Saipan Hotel] denies the commission of any unfair labor practices under the National Labor Relations Act because it asserts that the Board does not have jurisdiction in these cases." *Id.* And the stipulation stated that "the parties desire to submit this case for findings of fact, conclusions of law and order directly by the Board." *Id.*

Notwithstanding Saipan Hotel's possible intent to have bracketed out of the case the merits of the labor dispute, the stipulation plainly provides that the parties submitted the case, in its entirety, for decision by the NLRB. Certainly Saipan Hotel defended only on jurisdictional grounds, but Saipan Hotel was aware that the complaint, which was incorporated into the stipulation as exhibit B, and was thus part of the record presented to the NLRB, alleged that Saipan Hotel representatives had committed acts that violated the NLRA. Indeed, Saipan Hotel merely "denie[d] the commission of any unfair labor practices" – and withdrew its answer explaining that position. *Id.* The NLRB cannot be faulted, therefore, for issuing a remedial order against Saipan Hotel.

The CNMI, as *amicus curiae* for Saipan Hotel, argues that, even if the NLRB had authority to impose some remedy, the remedy the NLRB imposed forced Saipan Hotel into a Hobson's Choice between violating the terms of the NLRB's order or violating the CNMI's laws. The NLRB ordered reinstatement of nonresident workers, but the CNMI states that resident workers had already been

hired to fill the vacant positions. Because CNMI's Nonresident Workers Act ("NWA") requires employers to accord preference to resident workers, 3 N. Mar. I. Code § 4411, CNMI argues that Saipan Hotel was placed into an impossible position: if it fired the replacement resident workers for no reason other than to fill their positions with particular nonresident workers, it would violate CNMI law; if it refused to reinstate the discriminatee nonresident workers, it would violate the NLRB's remediation order.

The NLRB argues that its remediation order was consistent with CNMI law because it required Saipan Hotel to apply for entry permits and work authorizations for the nonresident discriminatees in accordance with the NWA. Further, the NLRB argues that there is no evidence showing how many of the discriminatees' positions Saipan Hotel had filled with resident workers, so it is not clear whether Saipan Hotel was in fact faced with any dilemma regarding whom to maintain in its employ. But assuming that Saipan Hotel was faced with such a dilemma, the NLRB notes (and the CNMI concedes) that Saipan Hotel was able to reinstate the nonresident discriminatees either to their former positions or to substantially similar positions. The NLRB further argues that in the single instance in which Saipan Hotel was faced with an apparent conflict between a replacement resident and a nonresident discriminatee who vied for the only position within a job category, Saipan Hotel could have created a second, substantially similar position for the nonresident worker, and maintained the replacement resident worker on its payrolls as well. The NLRB argues that this "double-hire" situation would not work an

undue hardship on Saipan Hotel because it should not have discriminated against the workers in the first instance. Indeed, the NLRB compares this potential situation to "the situation faced by any employer who, having unlawfully discharged an employee, must pay him backpay for the period during which he was not in its employ while he was also paying wages to his replacement for that period." Appellee's Br. at 43.

The NLRB is correct that its remedial order did not in any way require Saipan Hotel to violate CNMI law, as codified in the NWA. First, the remedial order did require that Saipan Hotel obtain for the nonresident workers work authorizations and reentry permits in accordance with the NWA. *Cf. Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984) ("By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided."). Second, the CNMI's concession that Saipan Hotel was able to reinstate 20 of the 21 the [sic] workers without violating the NWA is fatal to its argument because the NLRB offers a workable solution for the 21st worker. If Saipan Hotel suffers economic loss as a result of the remedial order, that is consistent with the NLRA's purpose.

Finally, the Hyatt Regency Saipan ("Hyatt Regency"), as *amicus curiae* for Saipan Hotel, argues that the NLRB's requirement that Saipan Hotel give the nonresident discriminatees backpay violates *Sure-Tan*. In *Sure-Tan*, the Court held that employees could only receive backpay for periods during which they were "lawfully entitled to be present and employed in the United States." *Id.* Hyatt Regency argues by analogy that the nonresident employees who were fired or not rehired had no legal

right to employment in the CNMI, and so the NLRB should not have accorded them reinstatement and backpay.

Hyatt Regency's argument is inapposite. There is no evidence, and even Hyatt Regency does not argue, that the nonresident workers at issue here had gained admittance to the CNMI illegally. Instead, they were lawfully entitled to work in the CNMI; they just were not CNMI residents. *Sure-Tan* did not preclude legal aliens in the United States from receiving backpay or reinstatement. *Id.* Thus, the nonresident workers here were entitled to the full benefit of any remedies the NLRB was authorized to order.

Although we hold that the remediation the NLRB ordered in this case did not violate the CNMI's immigration law, we do note that potential for conflict does exist between some remedies available under the NLRA and the CNMI's immigration law and policies. The NLRB should be careful, as it apparently was in this case, to respect the CNMI's sovereign control over its immigration matters.

Saipan Hotel's petition for review is **DENIED**, and the NLRB's petition for enforcement is **GRANTED**.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAIPAN HOTEL CORP., d.b.a. Hafadai Beach Hotel., Petitioner/ Cross-Respondent, vs. NATIONAL LABOR RELATIONS BOARD, Respondent/ Cross-Petitioner.	)	Nos. 96-70076 96-70198
SAIPAN HOTEL CORP., d.b.a. Hafadai Beach Hotel., Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	No. 96-70403 ORDER (Filed June 12, 1996)

The employer's motion to consolidate Nos. 96-70076 and 96-70403 for purposes of briefing is denied. The above captioned cases shall be scheduled for disposition before the same panel. The motion to file a brief exceeding the limit of 9th Cir. R. 32 is denied as moot. The current briefing schedules remain in place.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

/s/ Cole Benson
Cole Benson
Deputy Clerk
Ninth Cir. R. 27-7/Appendix A, General Orders for the United States Court of Appeals

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

SAIPAN HOTEL CORPORATION d/b/a HAFADAI BEACH HOTEL, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD and the COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS DEPARTMENT OF LABOR AND IMMIGRATION, Defendants.	Civil Action 95-0012 ORDER DISMISSING COMPLAINT AND DENYING INJUNCTIVE RELIEF (Filed Jun. 9, 1995)

This matter came before the Court on May 26, 1995, for oral argument of a motion for preliminary injunction filed by Plaintiff Saipan Hotel Corporation d/b/a Hafadai Beach Hotel ("Hafadai") against Defendants National Labor Relations Board ("NLRB" or "the Board") and the Commonwealth of the Northern Mariana Islands Department of Labor and Immigration ("CNMI-Labor"), and the NLRB's Motion to Dismiss the Complaint.

Plaintiff Hafadai was represented by Anna M. Elento-Sneed and Marcia K. Schultz of Carlsmith, Ball, Wichman, Case & Ichiki. Defendant NLRB was represented by

Randy Girer and Mary Ann Pacacha of the NLRB, Subregion 37. Defendant CNMI-Labor was represented by Charles Rotbart and Virginia Sablan of the CNMI Attorney General's Office. Intervenors Commonwealth Labor Federation ("CLF" or "the Federation") and Hotel Employees and Restaurant Employees Union, Local 5, AFL-CIO ("the Union"), were represented by William A. Sokol of Van Bourg, Weinberg, Roger & Rosenfeld and John Cool.

Prior to the hearing on the motion for preliminary injunction, the Court heard oral argument on a joint Motion to intervene filed by the CLF and the Union. Hafadai opposed the Motion to Intervene on the basis that any argument by the CLF and the Union would be redundant of the NLRB's arguments. The Board did not oppose the Motion. Upon consideration of oral argument and written papers filed, the Court granted the Motion to Intervene pursuant to Federal Rule of Civil Procedure 24(a) on the grounds that the Federation and the Union would be presenting arguments different than those advanced by the NLRB and, as such, their interests were not adequately represented by the existing parties.

The Court then heard from Hafadai regarding the NLRB's Motion to Dismiss the Complaint. The Motion to Dismiss was not properly before the Court because there had been no motion for order shortening time, nor a request for a hearing date. Hafadai did not object to allowing the Motion to Dismiss to be argued simultaneously with the motions for injunction, which the Court allowed.

Hafadai then proceeded on its motion for injunctive relief, with the Board following on its Motion to Dismiss the Complaint and cross-motion for injunctive relief.[1] The Court then advised the parties that the motions in this action would be heard simultaneously with the motions in Civil Action 95-0013, with the CNMI-Labor, the CLF and the Union each being given one opportunity to be heard on the motions, and each of the movants being given one opportunity to reply to the other movant's motion.

After review of the written and oral arguments of the parties and for the reasons set forth below, the Court hereby DISMISSES Hafadai's Complaint for Declaratory Judgment, and DENIES Hafadai's Motion for Preliminary Injunction in its entirety.

BACKGROUND

Plaintiff Hafadai currently employs both resident and nonresident workers at its Garapan, Saipan, CNMI facility where it operates a hotel and restaurants. The nonresidents are nonimmigrant alien contract workers employed pursuant to the terms and conditions of the CNMI Nonresident Workers Act ("NWA"), 3 CMC Chapter 4. The NWA was promulgated pursuant to § 503(a) of the Covenant,[2] which reserves control over immigration and naturalization within the CNMI to the CNMI.

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[1] *See* Civil Action 95-0013, NLRB's Petition for Injunction under § 10(j) of the NLRA, 29 U.S.C. § 160(j).

[2] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("the Covenant"), Act of Mar. 24, 1976, Pub. L. No.

In November of 1994, the CLF filed a Petition for Certification of Representative with the NLRB requesting that the Board conduct an election to determine if the Federation should be certified as the collective bargaining representative for Hafadai's employees, including both resident and nonresident employees, but excluding managers, professionals, confidential employees, guards and supervisors employed by Hafadai.[3] Hafadai objected to the Board's exercise of jurisdiction over the nonresident employees alleging that the CNMI maintained exclusive jurisdiction over the terms and conditions of their employment pursuant to § 503(a) of the Covenant. The NLRB held hearings on the matter in January 1995 at which time the Petition for Certification of Representative was amended to include the Hotel Employees and Restaurant Employees Union, Local 5, AFL-CIO, as a joint petitioner with the CLF. The NLRB Regional Director issued a Decision and Direction of Election on March 23, 1995, asserting Board jurisdiction over Hafadai's employees, including the nonresident workers, and directing that an election be held to determine if the joint petitioners should be certified as the collective bargaining representative of the resident and nonresident employees of Hafadai. In April 1995, Plaintiff Hafadai filed a request with the NLRB for review of the Regional Director's Decision which was denied.

94-241, 90 Stat. 263 (codified as amended at 48 U.S.C. § 1681 (1988)).

[3] These employees are excluded from the collective bargaining unit under the National Labor Relations Act, 29 U.S.C. § 159(b).

In addition to the foregoing proceedings relating to the certification election, separate proceedings are pending before the NLRB. The CLF and certain individual nonresident employees of Hafadai have filed unfair labor practice charges with the NLRB alleging that Hafadai has violated and continues to violate the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq., by failing to renew certain nonresident employment contracts because of those employees' union and other protected concerted activities and by committing various other illegal acts. Hafadai objects that the NLRB does not have jurisdiction over nonresident workers in the CNMI. In April 1995, the NLRB consolidated at least eighty-seven pending unfair labor practice charges into one administrative complaint. The next step will be for the Board to conduct a hearing on that complaint. At this point neither a hearing on the administrative complaint nor a certification election has been scheduled.

In response to the foregoing proceedings, Hafadai filed a Complaint for Declaratory Judgment and Injunctive Relief with this Court, alleging that the Board will soon hold the aforementioned election, and that if joint petitioners are certified as the collective bargaining representative of Plaintiff's employees, Hafadai will be required by the NLRA to bargain over the terms and conditions of employment, which terms and conditions are also subject to the CNMI NWA. Hafadai contends that the NLRA and the NWA conflict, and that Hafadai cannot comply with one without violating the other. Hafadai requests that the Court adjudge that 1) the policies and procedures of the NLRA conflict with the policies and procedures of the NWA; 2) that the NLRA is preempted

by the NWA; and 3) the Board be enjoined from exercising jurisdiction over the nonresident employees of Hafadai as long as § 503(a) of the Covenant is in effect.

Three days after Hafadai filed its Complaint for Declaratory and Injunctive Relief, the NLRB petitioned this Court in a separate civil action for appropriate injunctive relief against Hafadai pursuant to § 10(j) of the NLRA, 29 U.S.C. § 160(j), pending the final disposition of the administrative complaint before the Board charging that Hafadai is engaging in unfair labor practices in violation of § 8(a)(1) and (3) of the NLRA, 29 U.S.C § 158(a)(1) and (3). *See* Civil Action 95-0013, NLRB's Petition for Injunction pursuant to § 10(j) of the NLRA, as amended, 29 U.S.C. § 160(j). In its petition for injunction, the Board seeks to enjoin Hafadai from repeating numerous acts and conduct which the Board alleges violates the NLRA.

Subsequent to filing the injunctive pleadings in both this action and Civil Action 95-0013, the parties filed a stipulation agreeing to maintain the status quo until the date of this hearing. The parties agreed that the Board would not schedule an election or issue a notice of hearing in any existing unfair labor practice complaints involving Hafadai until after this hearing. After oral argument on the motions, the Court ordered that the status quo be maintained until this Order issued.

DISCUSSION

In its Complaint for Declaratory and Injunctive Relief, Hafadai asks the Court to declare that the policies and procedures of the NLRA and the NWA conflict and to enjoin the NLRB from exercising its jurisdiction over

nonresidents until this conflict is resolved. Hafadai contends that the NWA, enacted pursuant to Covenant § 503(a) which reserves to the CNMI the right to control immigration and naturalization in the CNMI, provides for exclusive control over the terms and conditions under which nonresidents may enter and be employed in the CNMI, thereby precluding application of the NLRA to nonresident workers in the CNMI.

The Board argued that dismissal of the Complaint is proper pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6), for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, respectively, and that denial of injunctive relief is proper as the Court lacks subject matter jurisdiction to enjoin Board proceedings.

The Board first argued that Hafadai's jurisdictional basis is faulty. Hafadai invoked jurisdiction pursuant to § 903 of the Covenant which provides:

> Nothing herein shall prevent the presentation of cases or controversies arising under this Covenant to courts established by the Constitution or laws of the United States. It is intended that any such cases or controversies will be justiciable in such courts and that the undertakings by the Government of the United States and by the Government of the Northern Mariana Islands provided for in this Covenant will be enforceable in such courts.

48 U.S.C. § 1681 (1988). Accordingly, this Court has jurisdiction over cases or controversies arising under the Covenant. Hafadai contends that the conflicts it will face when forced to comply with both the NLRA and NWA

amount to a controversy arising under the Covenant. Conversely, the Board argues that no case or controversy presently exists between the NWA and the NLRA, as the Board has not yet ordered or taken any action that infringes upon the CNMI's control of its immigration. The NLRB asserts that merely a potential for conflict between the NWA and the NLRA does not rise to the level of a case or controversy required for jurisdiction pursuant to § 903 and thus there is no justiciable issue before the Court.[4]

Article III of the United States Constitution requires that there be an actual case or controversy at the time a federal court decides a case. *Burke v. Barnes*, 479 U.S. 361, 363 (1987). A justiciable controversy "must be definite and concrete . . . a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (citations omitted). At this time, Hafadai has not yet had to comply with any Board order and thus has not been faced with an actual conflict between the NLRA and

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[4] Additionally, the Board asserts that if it should order that specific action be taken under the NLRA which is arguably in direct conflict with the Covenant, and therefore creates a case or controversy that is ripe for adjudication, it will be for the Ninth Circuit to adjudicate and not this Court. While the Court recognizes that actions taken by the NLRB in the exercise of its authority to enforce the NLRA are reviewable only in the appropriate circuit court of appeals, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938), with very limited exceptions, this Court retains jurisdiction over cases or controversies arising under the Covenant pursuant to § 903.

the NWA. The conflicts suggested by Hafadai are merely speculative and hypothetical in nature and would materialize only if the Board were to issue an order that would necessitate Hafadai violating the NWA. "The ripeness doctrine demands that litigants state a claim on which relief can be granted and that litigants' asserted harm is 'direct and immediate' rather than speculative or hypothetical." *Hillbloom v. United States*, 896 F.2d 426, 430 (9th Cir. 1990) (citing to *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967)). Therefore, Hafadai has failed to present a justiciable case or controversy as required by § 903 of the Covenant for this Court to exercise jurisdiction. Accordingly, Hafadai's Complaint for Declaratory Relief is DISMISSED as to all Defendants pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

Hafadai also requested injunctive relief pending the outcome of the declaratory relief sought in this matter. Specifically, Hafadai requested that the Court enjoin the NLRB from exercising jurisdiction over the nonresident employees of Plaintiff so long as § 503(a) of the Covenant is in effect. Both the Board and the CNMI assert that this Court is without subject matter jurisdiction to grant the relief sought by Hafadai to enjoin the Board and request that the Court deny Hafadai's Application for Injunctive Relief in its entirety. The NLRB argues that during the course of unfair labor practice or representation proceedings, a district court is without jurisdiction to enjoin or restrain the Board.

In *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), the Supreme Court held that federal district courts are without jurisdiction to enjoin or restrain the NLRB

from holding hearings on a complaint filed by the Board charging an employer with unfair labor practices. *Id.* at 48. This is because Congress vested in the Board and the circuit court of appeals the exclusive power to prevent any person from engaging in unfair labor practices affecting commerce under the NLRA. *Id.* Furthermore, the exhaustion of administrative remedies doctrine holds that judicial review is only available upon entry of the Board's unfair labor practice decision and order, and then only by the circuit court of appeals. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937); *see also* 29 U.S.C. § 160(e) and (f) (Board decisions and orders are reviewable directly and exclusively in the appropriate federal courts of appeals pursuant to § 10(e) and (f) of the NLRA). Additionally, Board representation proceedings and decisions at the conclusion of these proceedings are not subject to judicial review by federal district courts. *A.F.L v. NLRB*, 308 U.S. 401, 409 (1940).

For the foregoing reasons, I find it is not within the jurisdiction of this Court to enjoin the unfair labor practice and certification proceedings involving Hafadai currently pending before the Board and accordingly Hafadai's Application for Injunctive Relief is DENIED in its entirety.

CONCLUSION

1. Hafadai's Complaint for Declaratory Relief is DISMISSED as to all Defendants pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

2. Hafadai's Application for Injunctive Relief is DENIED in its entirety.

IT IS SO ORDERED.

DATED this 9th day of June, 1995.

/s/ Alex R. Munson
Alex R. Munson
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

ROBERT H. MILLER, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Petitioner, v. SAIPAN HOTEL CORPORATION, d/b/a HAFADAI BEACH HOTEL, Respondent.	Civil Action 95-0013 ORDER GRANTING § 10(J) INJUNCTION (Filed Jun. 09 1995)

This matter came before the Court on May 26, 1995, for oral argument of the Petition for injunction pursuant to § 10(j) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(j), filed by Robert H. Miller, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board ("Petitioner," "NLRB" or "the Board"). Petitioner was represented by Randy Girer and Mary Ann Pacacha of the NLRB, Subregion 37. Respondent Saipan Hotel Corporation d/b/a/ Hafadai Beach Hotel ("Respondent," "Hafadai" or "the hotel") was represented by Anna M. Elento-Sneed and Marcia K. Schultz of Carlsmith, Ball, Wichman, Case & Ichiki. Petitioner in Intervention Commonwealth of the Northern Marianas Department of Labor and Immigration ("CNMI-Labor") was represented by Charles Rotbart and Virginia Sablan

of the CNMI Attorney General's Office. Joint Petitioners in Intervention Commonwealth Labor Federation ("CLF" or "the Federation") and Hotel Employees and Restaurant Employees Union, Local 5, AFL-CIO ("the Union") were represented by William A. Sokol of Van Bourg, Weinberg, Roger & Rosenfeld and John Cool.

Prior to the hearing on the motion for preliminary injunction, the Court heard oral argument on Motions to Intervene filed by the CLF and Union, and by CNMI-Labor. The motion filed by the CLF and Union was not properly before the Court because there had been no motion for order shortening time and requesting a hearing date. CNMI-Labor's Motion to Intervene was filed and presented to the Court during the hearing and although there was a motion for order shortening time and request for hearing, the Court was unable to review the motions at that time. However, all parties stipulated to waiving the time requirements for motion practice and did not object to the Court entertaining the Motions to Intervene at that time. The Court took the Motions to Intervene under advisement and allowed the parties to argue.

The NLRB opposed the CLF and Union's Motion to Intervene on the grounds that the Board has exclusive jurisdiction to seek a § 10(j) injunction and can adequately represent the CLF and Union's interests in these proceedings. The NLRB also opposed CNMI-Labor's intervention on the basis that CNMI-Labor's asserted interest in protecting the laws of the Commonwealth from encroachment by federal law was purely speculative at this time, and thus it would be premature to allow them to assert any interest in these proceedings. Hafadai

also opposed the CLF and Union's Motion to Intervene but was in favor of allowing CNMI-Labor to intervene on the grounds that CNMI-Labor would be able to lend support to Hafadai's theory that there is a present conflict between the CNMI Nonresident Worker's Act ("NWA"), 3CMC Chapter 4, and the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. § 151 et seq.

After review of the written and oral arguments of the parties, the Court DENIES the CLF and the Union's Motion to Intervene pursuant to Federal Rule of Civil Procedure 24(a) on the grounds that the Board can fully and adequately represent all of their rights and interests at this time. The Court also DENIES CNMI-Labor's Motion to Intervene for the reason that its interest at this time is purely speculative. Further, for the reasons set forth below, the Court GRANTS the Board's Petition for Injunction pursuant to § 10(j) of the NLRA.

BACKGROUND

Respondent currently employs both resident and nonresident workers at its Garapan, Saipan, CNMI facility where it operates a hotel and restaurants. The nonresidents are nonimmigrant alien contract workers employed pursuant to the terms and conditions of the NWA. The NWA was promulgated pursuant to § 503(a) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (codified as amended at 48 U.S.C. § 1681 (1988)) ("the Covenant"), which reserves control over immigration and naturalization within the CNMI to the CNMI.

In November of 1994, the CLF filed a Petition for Certification of Representative with the NLRB requesting that the Board conduct an election to determine if the Federation should be certified as the collective bargaining representative for Hafadai's employees, including both resident and nonresident employees, but excluding managers, professionals, confidential employees, guards and supervisors employed by Hafadai.[1] Hafadai objected to the Board's exercise of jurisdiction over the nonresident employees alleging that the CNMI maintained exclusive jurisdiction over the terms and conditions of their employment pursuant to § 503(a) of the Covenant. The NLRB held hearings on the matter in January 1995 at which time the Petition for Certification of Representative was amended to include the Hotel Employees and Restaurant Employees Union, Local 5, AFL-CIO, as a joint petitioner with the CLF. The NLRB Regional Director issued a Decision and Direction of Election on March 23, 1995, asserting Board jurisdiction over Hafadai's employees, including the nonresident workers, and directing that an election be held to determine if the joint petitioners should be certified as the collective bargaining representative of the resident and nonresident employees of Hafadai. In April 1995, Respondent filed a request with the NLRB for review of the Regional Director's Decision which was denied.

In addition to the foregoing proceedings relating to the certification election, separate proceedings are pending before the NLRB. The CLF and certain individual

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[1] These employees are excluded from the collective bargaining unit under the NLRA, 29 U.S.C. § 159(b).

nonresident employees of Hafadai have filed unfair labor practice charges with the NLRB alleging that Hafadai has violated and continues to violate the NLRA, by failing to renew certain nonresident employment contracts because of those employees' union and other protected concerted activities and by committing various other illegal acts. In April 1995, the NLRB consolidated at least eighty-seven pending unfair labor practice charges into one administrative complaint. The next step will be for the Board to conduct a hearing on that complaint. At this point neither a hearing on the administrative complaint nor a certification election has been scheduled.

In response to the foregoing proceedings, Hafadai filed a Complaint for Declaratory Judgment and Injunctive Relief with this Court, *see* Civil Action 95-0012, alleging that the Board will soon hold the aforementioned election, and that if joint petitioners are certified as the collective bargaining representative of Respondent's employees, Hafadai will be required by the NLRA to bargain over the terms and conditions of employment, which terms and conditions are also subject to the CNMI NWA. Hafadai contends that the NLRA and the NWA conflict, and that Hafadai cannot comply with one without violating the other. In that action, Hafadai requested that the Court declare that the NLRA conflicts with the NWA, and that the NWA preempts the NLRA, and additionally requested that the Board be enjoined from exercising jurisdiction over the nonresident employees of Hafadai as long as § 503(a) of the Covenant is in effect. The Board disagreed and expressed that a remedy could be fashioned to avoid a conflict.

Three days after Hafadai filed its Complaint for Declaratory and Injunctive Relief, the NLRB filed this action petitioning the Court for appropriate injunctive relief pursuant to § 10(j) of the NLRA pending the final disposition of the administrative complaint presently before the Board charging that Hafadai is engaging in unfair labor practices in violation of § 8(a)(1) and (3) of the NLRA, 29 U.S.C. § 158(a)(1) and (3). Specifically, the Board seeks to enjoin Hafadai from repeating acts and conduct which the Board alleges violates the NLRA. Such alleged acts include, but are not limited to, failing to renew the employment contracts of certain employees, refusing to rehire another employee and threatening to discharge and deport employees because of their union and/or other protected concerted activities.

The Board contends that unless Hafadai is immediately enjoined and interim injunctive relief granted, the alleged violations of the NLRA will continue. The Board asserts that this will result in frustration of the collective bargaining process and enforcement of the NLRA before Hafadai can be placed under legal restraint through the regular administrative procedures of a Board order and an enforcement decree of the Ninth Circuit Court of Appeals. The Board argues that if such alleged violations are allowed to continue pending the final outcome of the administrative hearing, the employees will be denied their jobs, denied an opportunity to select the union as their collective bargaining representative, and deprived of the benefits of good-faith collective bargaining through a properly elected representative. As a result, the Board argues, there will be irreparable injury to the Union's efforts to organize employees thus undermining the

Union's status as the potential collective bargaining representative, thereby frustrating the Board's ultimate remedial authority. The Board requests that this Court issue an order directing Hafadai to cease and desist from certain acts and conduct and take certain other remedial steps to restore the status quo ante pending the final disposition of the matters now before the NLRB.

Subsequent to filing the motions for injunctions in this action and Civil Action 95-0012, the parties filed a stipulation agreeing to maintain the status quo until the date of this hearing. The parties agreed that the Board would not schedule an election or issue a notice of hearing in any existing unfair labor practice complaints involving Hafadai until after this hearing. After oral argument on the motions, the Court ordered that the status quo be maintained until this Order issued.

DISCUSSION

Pursuant to § 10(j) of the NLRA, the Board has requested a preliminary injunction issue against Hafadai to restrain it from engaging in unfair labor practices pending the final disposition of the unfair labor practice administrative charges. Additionally, the Board seeks to restore the status quo ante, by reinstatement of Respondent's former employees who allegedly were discharged because of their union activities.

Section 10(j) of the NLRA provides that the Board shall have power, upon issuance of a complaint charging that any person has engaged in unfair labor practices, to petition any United States district court, within any district wherein the unfair labor practice in question is

alleged to have occurred or wherein such person resides or transacts business, for appropriate injunctive relief or restraining order pending final disposition of the matter by the Board, and the court shall have jurisdiction to grant "just and proper" injunctive relief. 29 U.S.C. § 160(j). Section 10(j) was enacted to provide interim injunctive relief so that the delay that occurs before the NLRB issues its ruling in an unfair labor practice proceeding would not frustrate the desired objective of the NLRA to protect the collective bargaining process. *Miller v. California Pacific Medical Center,* 19 F.3d 449, 459-460 (9th Cir. 1994) (en banc), vacating 991 F.2d 536 (9th Cir. 1993).

On March 28, 1995, after a reasonable cause determination, the Board issued a consolidated complaint against Hafadai alleging at least eighty-seven unfair labor practices in violation of § 8(a)(1) and (3) of the NLRA. Accordingly, the Board petitioned this Court for just and proper injunctive relief, pending the outcome of the administrative proceedings.

The granting of a § 10(j) injunction that is just and proper entails consideration of traditional equitable criteria by a district court, paying special attention to the underlying purpose of § 10(j), which is "to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge." *Id.* The equitable criteria to be considered include the likelihood that the petitioner will succeed on the merits; the possibility of irreparable injury to the petitioner if relief is not granted; the extent to which the balance of hardships favors the respective parties; and

whether the public interest will be advanced by granting relief. *Id.* at 456, 459.

Regarding the likelihood of success on the merits in § 10(j) proceedings, the Regional Director must, as a minimum, demonstrate a fair chance of success on the merits, showing "some evidence to support the unfair labor practice charge, together with an arguable legal theory." *Id.* at 460. Additionally, recognizing that it is the NLRB that has primary responsibility for declaring federal labor policy, the district court should be hospitable to the views of the Regional Director with regard to matters of law in a § 10(j) proceeding, *Id.*, and give deference to NLRB's interpretation of the factual issues upon which the injunction is based. *Id.* at 462.

In cases involving an alleged violation of a federal statute, "the strength of the government's showing on the likelihood of prevailing on the merits will affect the degree to which it must prove the irreparable injury." *Id.* at 459. Irreparable harm will be presumed if the Board demonstrates that it is likely to prevail on the merits or the respondent concedes to the unfair labor practice charge. *Id.* at 460. However, the court is to expressly weigh irreparable harm if the Board only has a fair chance of success on the merits or the charge is disputed. *Id.* Additionally, when evaluating irreparable harm and considering the balance of hardships, the district court must "take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority." *Id.* at 460. The public interest of preserving the NLRB's remedial power during administrative proceedings is also an important factor for

the Court in the exercise of equitable discretion. *Id.* at 459-460.

Applying the foregoing equitable criteria, the Board contends it will be successful on the merits in the pending unfair labor practice hearing first by establishing jurisdiction over Hafadai's nonresident workers, and second, by establishing that Hafadai has committed unfair labor practices in violation of the NLRA as alleged in the administrative complaint. Conversely, Hafadai denies any violations and contends that the Board has no standing to seek § 10(j) relief because exclusive jurisdiction over nonresidents is given to the CNMI pursuant to Covenant § 503(a), thereby precluding application of the NLRA to nonresidents in the CNMI.

Regarding the jurisdictional issue, two cases support the Board's position that the NLRA applies to nonresident employees in the CNMI and therefore the NLRB is able to assert jurisdiction over them. In *Micronesian Telecommunications Corp. v. NLRB*, 820 F.2d 1097, 1101 (9th Cir. 1987), the Ninth Circuit held that the NLRA is generally applicable to employers engaged in commerce in the Northern Mariana Islands. The parties do not dispute that resident workers in the CNMI are covered by the NLRA. In the second case, *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 892-893 (1984), the Supreme Court held that undocumented aliens employed in the United States constitute employees under the NLRA and are therefore entitled to the Act's protections. Hafadai's nonresident workers are

employees within the meaning of § 2(3) of the NLRA, 29 U.S.C. § 152(3).[2]

Despite these rulings, Hafadai contends that because § 503(a) of the Covenant gives the CNMI sovereignty over immigration and naturalization in the Commonwealth, the protections of the NLRA are not applicable to nonresidents. Hafadai argues that the policies and procedures of the NWA, promulgated pursuant to § 503(a) of the Covenant, conflict with the NLRA, and thus to comply with the NLRA would necessarily cause violations of the NWA.

I conclude that Hafadai's argument that compliance with both the NWA and NLRA will necessarily cause violations of the other law is premature. As determined by the Regional Director of the NLRB in the Decision and Direction of Election issued on March 23, 1995, compliance with the NLRA will not necessarily conflict with the NWA or its implementing regulations. *See* Saipan Hotel Corp. d/b/a Hafadai Beach Hotel, No. 37-RC-3687 (N.L.R.B. March 23, 1995) (Decision of Direction and Election). The NWA merely establishes statutory minimums for the employment of nonresidents. CNMI-Labor expressed in its Memorandum in Support of its Motion to Intervene its belief that the NLRA is applicable in the CNMI to the extent that it does not conflict with the NWA. Moreover, even if a conflict arises between the NWA and the NLRA, this does not necessarily make the

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[2] The section provides "[t]he term 'employee' shall include *any* employee, and shall not be limited to the employees of a particular employer . . . " 29 U.S.C. § 152(3) (emphasis added).

NLRA inapplicable in the CNMI. At such time as a conflict might arise, the allegedly aggrieved employer may obtain review of the Board directed remedial action by the Ninth Circuit Court of Appeals. *See* 29 U.S.C. § 160(f).

As the NLRA clearly applies to employers in the CNMI, *Micronesian Telecommunications*, 820 F.2d at 1101, and Hafadai's nonresident workers are clearly employees pursuant to § 2(3) of the NLRA, it appears reasonable and logical, and I so hold, that the NLRA is applicable to nonresident alien contract workers in the CNMI. This finding will not diminish CNMI-Labor's ability to retain control over immigration as intended by the Covenant, and will afford nonresident employees the same protections afforded to resident workers in the CNMI. To hold otherwise would create a separate class of persons in the CNMI; a class that is unprotected by the very law that Hafadai acknowledges applies to resident employees in the CNMI.

Accordingly, I conclude that the Board is likely to succeed on establishing jurisdiction over all Hafadai employees, both resident and nonresident (excluding managers, supervisors, professionals, guards and confidential employees),[3] in the administrative unfair labor practice proceeding.

Additionally, I find that the Board has demonstrated an overwhelming chance of success on the merits in the administrative proceedings, making more than an adequate showing of "some evidence to support the unfair

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[3] These employees are excluded from the collective bargaining unit under the NLRA, 29 U.S.C. § 159(b).

labor practice charge[s], together with an arguable legal theory." *Miller*, 19 F.3d at 460. Together with its petition for § 10(j) relief, the Board submitted the consolidated complaint filed against Hafadai currently pending before the NLRB, along with affidavits, declarations and other exhibits, as proof that it will establish that Hafadai has engaged in and is engaging in unfair labor practices in violation of § 8(a)(1) and (3) of the NLRA. Specifically, the Board alleges Hafadai has violated § 8(a)(1) of the NLRA by: instructing employees not to join or support the Union; threatening to discharge and deport employees if they engage in union and/or other protected concerted activities; threatening not to renew employee employment contracts; interrogating employees regarding their union and/or other protected concerted activities; threatening employees with reprisals; promising benefits to employees if they renounce their protected concerted activities; telling employees their employment contracts would not be renewed because they had engaged in union and other protected concerted activities; creating the impression among employees that their union and other protected concerted activities were under surveillance; promulgating and enforcing a rule prohibiting employees from discussing their terms and conditions of employment; threatening to reduce employee benefits for engaging in protected concerted activities; and prohibiting employees from visiting its staff housing area because they had engaged in protected concerted activities.

Additionally, the Board has charged Hafadai with various other unfair labor practices in violation of § 8(a)(1) and (3) of the NLRA, including: subcontracting

its maintenance service department positions to a temporary employment agency following the employees' participation in union and in other protected concerted activities; imposing stricter and more onerous conditions of employment on employees and issuing disciplinary warnings to employees in retaliation for participation in union and other protected concerted activities; failing to renew the employment contracts of, terminating and refusing to pay accumulated vacation pay to certain employees because of union and protected concerted activities; and refusing to rehire employee Vicente Perez because of union and other protected concerted activity.

It is not the function of the Court in a § 10(j) proceeding to make findings on the merits of the alleged unfair labor practices charged against Hafadai, but rather to decide if the requested relief is "just and proper." *Miller*, 19 F.3d at 452. If Hafadai has in fact committed these acts, which are defined as unfair labor practices in the NLRA, then the Board is likely to succeed in the administrative hearing. Accordingly, as this Court is only to determine if the Board has shown "some evidence to support the unfair labor practice charge[s], together with an arguable legal theory," *Id.* at 460, I conclude that the Board has made a sufficient showing to establish a likelihood of success on the merits at the administrative hearing.

Hafadai also argues that the Board has not shown that it will suffer irreparable harm if the injunctive relief is not granted. Although the Board argues that irreparable harm should be presumed if the Board demonstrates that it is likely to prevail on the merits or the respondent concedes to the unfair labor practice charge, *Id.* at 460, in the instant case Hafadai does not concede it has done

anything wrong. Therefore, because the charges are disputed, the Court will expressly weigh irreparable harm. *Id.*

The Board argues that Hafadai's coercive and discriminatory conduct has chilled and seriously undermined the Union's organizing efforts and that if Hafadai is not restrained, such conduct will result in irreparable harm. In addition to chilling the employees' willingness to engage in pro-union activities, the Board argues that this conduct will irreparably undermine and frustrate the Board's ultimate authority to remedy the alleged violations effectively. The Board asserts that it may take a year or more to issue the order after the administrative hearing, which will be too late to restore or revive the union campaign. Additionally, the Board argues that interim injunctive relief enjoining Hafadai from further unlawful conduct will send a message to employees that blatant interference with their statutory rights will not be tolerated.

Hafadai asserts that the Board's contentions of irreparable harm are based on the false premise that the NLRA is applicable to the nonresident employees of Hafadai. However, as previously discussed, the Court finds that the NLRA is applicable to nonresidents and thus Hafadai's position is without merit. I find that the Board's contentions of irreparable harm are justified and that severe irreparable injury to the integrity of the collective bargaining process and the Board's remedial authority will be suffered if Hafadai is not restrained from the alleged unlawful conduct.

I also conclude that the balance of hardships of the parties weighs in favor of granting the injunction. Hafadai argues that it will be irreparably harmed by the issuance of a § 10(j) injunction that would remain in effect until the Board's decision on the jurisdictional issue can be reviewed by the Ninth Circuit. Hafadai contends that if it is forced to comply with both the NWA and the NLRA, as the Board proposes in the injunctive relief, the conflicts that arise will subject it to continuous claims from resident and nonresident employees for violations of both the NWA and the NLRA which amounts to irreparable harm. Hafadai cites as specific examples of injury: reinstatement of former employees subjects Hafadai to claims by "displaced employees;" ordering Hafadai to seek entry permits and "temporary work authorizations" creates confusion and ultimately subjects Hafadai to claims under the NWA; and maintaining a "preferred hiring list" creates inconsistent obligations with the NWA.

Conversely, the Board maintains that the displacement of current workers by interim reinstatement of discriminatees does not constitute irreparable harm. Additionally, the Board argues that requiring Hafadai to restore the status quo ante is necessary to prevent the alleged unfair labor practices from continuing. Finally, the Board asserts that Hafadai's claims of injury stemming from compliance with both the NLRA and NWA are purely speculative, and at most will result in monetary harm, which is minimal compared to the harm that will result if the § 10(j) injunction is not granted.

After consideration of the lengthy arguments by both parties and upon balancing of the harms, I conclude that

the allegations of potential harm to Hafadai fall far short of the injury that will be suffered by the Board and the Union's organizing efforts if interim relief is not granted. I find that interim reinstatement of discriminatees is "just and proper" even if it requires the displacement of employees hired to replace them. The rights of discriminatees to reinstatement are superior to the rights of those employees hired to take their places. *Maram v. Universidad Interamericana de Puerto Rico*, 722 F.2d 953, 959-950 (1st Cir. 1983). Furthermore, during oral argument the Board advanced several options available to Hafadai to handle potential claims by displaced workers.[4]

Finally, I conclude that the public interest favcrs the grant of an injunction in this case. "In § 10(j) cases, the public interest is to ensure that an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge." *Miller*, 19 F.3d at 460. Additionally, the public interest in promoting the union's organizational activities will suffer irreparable injury, because if such relief is not granted pending the outcome of the administrative hearing, and Hafadai is found to be in violation of the NLRA by the Board, the

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[4] The Board proposed three options for Hafadai when it displaces employees due to Court ordered reinstatement of the discriminatees: (1) reinstate the discriminatees and find new jobs for the displaced employees or retain the current employees and find new positions for the discriminatees; (2) reinstate the discriminatees, displace the replacement employees and suffer the legal consequences of terminating those employees' contracts; or (3) reinstate the discrininatees and settle with the displaced workers by purchasirg their employment contracts.

result will be that Hafadai has succeeded in chilling or permanently destroying the union organizational movement by its unlawful conduct before the Board's administrative order takes effect. On the other hand, by granting § 10(j) relief, Hafadai is simply requested to obey the law pending the outcome of the administrative hearing on the unfair labor practices.

Accordingly, to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charges against Hafadai, the Board's petition for § 10(j) injunction is GRANTED and it is HEREBY ORDERED that:

1. Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys, and all persons acting on its behalf or in participation with it, cease and desist from the following acts and conduct, pending the final disposition of the matters herein involved now pending before the National Labor Relations Board:

a. interrogating employees regarding their union activities and support;

b. threatening employees with job loss or nonrenewal of employment contracts because they engaged in union and/or other protected concerted activities;

c. threatening to decrease wages and benefits because employees engaged in union and/or other protected concerted activities;

d. soliciting grievances from employees and/or promising to remedy them, in order to dissuade

employees from supporting the union and/or engaging in other protected concerted activities;

e. threatening employees with discipline and unspecified reprisals because they engaged in union and/or other protected concerted activities;

f. threatening employees with discharge, failure to renew their contracts and/or deportation because they engaged in union and/or other protected concerted activities;

g. creating the impression that employees' union and/or other protected concerted activities are under surveillance;

h. denying employees whose contracts have not been renewed access to Respondent's Staff Housing area;

i. enforcing a rule prohibiting employees from discussing their terms and conditions of employment;

j. imposing stricter working conditions on employees because they engaged in union and/or other protected concerted activities;

k. denying vacation pay to employees because they engaged in union and/or other protected concerted activities;

l. subcontracting employees' jobs because employees engaged in union and/or other protected concerted activities;

m. informing employees that their contracts, and the contracts of other employees, would not be renewed because they engaged in union and/or other protected concerted activities;

n. discharging and refusing to rehire employees, refusing to renew employee employment contracts, issuing warning notices to employees, imposing more onerous working conditions on employees, or in any other manner discriminating against employees because of their union and/or other protected concerted activities;

o. in any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the NLRA.

2. Within seven days of this Order, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, are to take the following steps pending the final disposition of the matters herein involved now pending before the National Labor Relations Board:

a. offer to employees Antonio Alegre, Jose Barola, Henry Caceres, Celso Llanza, Cristeta Tupas, Peter Paul Guadalupe, Rusticio Reyes, Joselito Sioco, Antonio Peciller, Monica Cruz, Luz Dellota, Romeo Javier, Danilo Reyes, Liberto (Roberto) Andal, Fernando Dagucan, Hermilito Trampe, Melito Garcia, Christina Ortanez, Melvin Ortanez and all other employees whose employment contracts were not renewed from on or about September 1994 to the present because of their union and/or other protected concerted activities, interim reinstatement to their former positions, with no reduction in wages, seniority, or other rights and privileges, displacing, if necessary, any other persons hired or reassigned by Respondent as their replacements;

b. in accordance with the provisions contained in the Nonresident Workers Act, promptly advertise for each storekeeper position which is presently vacant or which becomes vacant during the pendency of this Order, and if no qualified resident workers apply for the storekeeper position(s), rehire Vicente Perez as a storekeeper and execute a standard annual employment contract with him; if a qualified resident(s) applies for the storekeeper position(s) and is hired, maintain a special preferential hiring list and include Perez' name on this list, which list shall be maintained for the duration of this Order;

c. rescind any subcontracts with which it is performing any work, including maintenance work, formerly performed by employees whose employment contracts were discriminatorily not renewed;

d. apply to the Department of Labor and Immigration, Commonwealth of the Northern Mariana Islands, for entry permits and temporary work authorizations for the employees named above in subparagraph 3a. and 3b., and any other employee to whom reinstatement is offered pursuant to this Order;

e. rescind the employee warning notices issued to Vicente Perez and Celso Llanza;

f. expunge from its files any references to the termination and/or failure to renew the employment contracts of the employees named above in subparagraph 3a., and any other employees who are found, pursuant to this Order, to be wrongfully terminated;

g. grant to employees whose contracts have not been renewed and to Vicente Perez, access to Respondent's staff housing area;

h. post copies of this Order, translated into Tagalog, at Respondent's Garapan, Saipan, facility, in all locations where notices to its employees are normally posted, maintain these postings during the Board's administrative proceeding free from all destructions and defacements, and grant to agents of the Board reasonable access to the facility to monitor compliance with the posting requirement; and

i. within twenty (20) days of the issuance of this Order, file with the Court, with a copy submitted to the Regional Director of the NLRB for Region 20, a sworn affidavit from a responsible official of Respondent, setting forth with specificity the manner in which Respondent is complying with the terms of the decree.

CONCLUSION

1. The CLF and the Union's Motion to Intervene is DENIED.
2. CNMI-Labor's Motion to Intervene is DENIED.
3. The Board's Petition for Injunction pursuant to § 10(j) of the NLRA, 29 U.S.C. § 160(j) is GRANTED.

IT IS SO ORDERED.

DATED this 9th day of June, 1995.

/s/ Alex R. Munson
Alex R. Munson
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

SAIPAN HOTEL CORPORATION d/b/a HAFADAI BEACH HOTEL, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD and the COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS DEPARTMENT OF LABOR AND IMMIGRATION, Defendants.	Civil Action 95-0023 NOTICE OF RULING ON ORDER TO SHOW CAUSE (Filed Oct. 18, 1995)

This matter came before the Court on Wednesday, October 18, 1995, on the Court's sua sponte order for Plaintiff Saipan Hotel Corporation d/b/a Hafadai Beach Hotel and Defendants National Labor Relations Board ("NLRB") and the Commonwealth of the Northern Mariana Islands Department of Labor and Immigration ("CNMI-Labor") to show cause why this action should not be dismissed without prejudice. Appearing on behalf of Plaintiff was Anna Elento-Sneed of Carlsmith, Ball, Wichman, Case & Ichiki. C. Sebastian Aloot appeared on behalf of Defendant CNMI-Labor. Assistant United States Attorney Frederick J. Kerley appeared on behalf of Defendant NLRB.

The Court, after hearing from the parties, and finding good cause shown, hereby orders that the case shall be

allowed to remain pending on the Court's docket. Beginning December 1, 1995, the parties are ordered to file jointly a brief report to be due the first day of each month, or the following Monday if the first day falls on a weekend, or the Tuesday following if Monday is a holiday. The report shall apprise the Court of the status of the on-going negotiations between the parties, the efforts taken to resolve this matter and any problems that are frustrating such efforts.

IT IS SO ORDERED.

DATED this 18th day of October, 1995.

/s/ Alex R. Munson
Alex R. Munson
Judge

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

SAIPAN HOTEL CORPORATION D/B/A HAFADAI BEACH HOTEL *and* ANTONIO ALEGRE, JOSE BAROLA, HENRY CACERES, CELSO LLANZA, AND CRISTETA TUPAS *and* VINCENTE PEREZ *and* COMMONWEALTH LABOR FEDERATION. Cases 37-CA-3977, 37-CA-3978, 37-CA-3983, 37-CA-4027, 37-CA-4051, 37-CA-4068, 37-CA-4074, and 37-CA-4134

May 1, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

Upon charges and amended charges filed by certain individuals and by the Commonwealth Labor Federation (the Union), the General Counsel of the National Labor Relations Board issued an order consolidating cases, second amended consolidated complaint and notice of hearing on August 8, 1995, and an amendment to the second amended consolidated complaint on August 23, 1995. The second amended consolidated complaint, as amended, alleges that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act. The Respondent

filed an answer to the second amended consolidated complaint and an amended answer to the second amended consolidated complaint, as amended.

On September 14, 1995, the parties jointly filed a motion to transfer the proceeding to the Board and a stipulation of facts. As part of the stipulation, the Respondent withdrew its answer to paragraphs 1 through 23 of the second amended consolidated complaint, and its amended answer to the second amended consolidated complaint, as amended, and relies here solely on its first and second affirmative defenses discussed below. The parties waived a hearing before an administrative law judge, and the issuance of an administrative law judge's decision and recommended Order. The parties agreed that the stipulation, with attached exhibits, including the charges and amended charges, the second amended consolidated complaint, the amendment to the second amended consolidated complaint, the answer, the amended answer, the transcripts, and exhibits in Case 37-RC-3687, the Employer's (the Respondent here) posthearing brief in Case 37-RC-3687, the Regional Director's Decision and Direction of Election in Case 37-RC-3687, the Employer's revised request for review in Case 37-RC-3687, and the Board's Order denying the Employer's request for review in Case 37-RC-3687, shall constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties.

On November 14, 1995, the Board issued its Order approving the stipulation and transferring the proceeding to the Board. Thereafter, the General Counsel and the Respondent filed briefs in support of their respective positions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

I. THE ISSUE

As noted above, the Respondent has withdrawn its answer filed to the second amended consolidated complaint and its amended answer to the amendment to the second amended consolidated complaint with the exception of its first and second affirmative defenses. Accordingly, the sole issue presented here is whether the Board properly asserted jurisdiction over a unit composed of both resident and nonresident workers at the Respondent's facility in Saipan, Commonwealth of the Northern Mariana Islands (CNMI).[1]

A. *The Contentions of the Parties*

In its first and second affirmative defenses, the Respondent contends, in effect, that the Board cannot exercise jurisdiction over the Respondent because under the terms of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States,[2] the Nonresident Workers Act (NWA)

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[1] In *Micronesian Telecommunications*, 273 NLRB 354 (1984), enf'd. 820 F.2d 1097 (9th Cir. 1987), the Board asserted jurisdiction over an employer in the CNMI, but there the unit was composed of resident workers alone. The issue of the Board's jurisdiction over nonresident workers was therefore not addressed in that case.

[2] Joint Resolution Approving the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America," 24 March 1976,

of the CNMI preempts the provisions of the National Labor Relations Act. In this regard, the Respondent contends that because the Covenant gives the CNMI "control over immigration and the terms and conditions of employment for nonresidents," and because the NWA, promulgated under the CNMI's immigration authority, conflicts with the National Labor Relations Act (NLRA), the NWA preempts the NLRA.

The General Counsel asserts that this issue was previously litigated and decided. In this regard, the General Counsel points out that in his Decision and Direction of Election dated March 23, 1995, in Case 37-RC-3687, the Regional Director for Region 20 found that the nonresident workers (also called "contract workers") were employees covered by the Act, that a unit including both these employees and the Respondent's resident workers constituted an appropriate bargaining unit, and that it would otherwise effectuate the purposes and policies of the Act to assert jurisdiction over the Respondent and its nonresident workers.[3] The Respondent filed a request for

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Pub.L. 94-241, 90 Stat. 263, reprinted in 48 U.S.C. § 1801 note, previously set out as § 1681 note.

[3] The RD defined the issue before him as "whether, because of the CNMI's regulatory scheme governing immigration, the nonresident workers in the CNMI should not be provided the same protections accorded to illegal aliens in the U.S., who are covered under the U.S. immigration system." The RD found that the Board's assertion of jurisdiction over the nonresident workers was proper because, contrary to the Employer's assertion, the National Labor Relations Act does not conflict with the CNMI's immigration law as codified in the Nonresident Workers Act and its implementing legislation.

review of the Regional Director's Decision and Direction of Election that the Board denied.

The General Counsel also maintains that the Respondent has presented no newly discovered and previously unavailable evidence and/or special or changed circumstances that would necessitate reexamination of the Board's initial decision to assert jurisdiction. Finally, in view of the Respondent's withdrawal of its answer to paragraphs 1 through 23 of the second amended consolidated complaint, and its amended answer to the second amended consolidated complaint, as amended, the General Counsel requests the Board to find that the Respondent has committed the violations of Section 8(a)(1) and (3) of the Act set out in the second amended consolidated complaint, as amended.

B. *Discussion*

We agree with the General Counsel that it would be improper to relitigate the issue of jurisdiction in the present case. In reaching this conclusion, we find controlling Section 102.67(f) of the Board's Rules and Regulations:

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. *Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.* [Emphasis added.]

Subsequent unfair labor practice cases "related" to prior representation proceedings include not only Section 8(a)(5) refusal-to-bargain cases where there is a test of certification, but also, in appropriate circumstances, unfair labor practice cases that arise under other sections of the Act. As explained in *Verland Foundation*, 296 NLRB 442, 443 (1989):

> The regulation [Section 102.67(f)] does not state that representation case issues, such as jurisdiction, may be relitigated in all cases other than tests of certification. The absence of any qualification clearly indicates that the Board, in issuing this rule, meant to prevent relitigation in *all* "related subsequent unfair labor practice proceeding(s)."[4]

As in *Verland*, the issue of jurisdiction was a primary issue in Case 37-RC-3687, the prior representation proceeding. "It was the predicate for that case, as it is this one." Id. Because the issue was fully litigated in the

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[4] In *Verland*, the General Counsel alleged that the respondent had engaged in conduct violative of Sec. 8(a)(1) and (3) of the Act. Although noting that certain subsidiary issues, such as supervisory status, could be relitigated in a subsequent unfair labor practice proceeding, the judge found that the unfair labor practice case was "related" to the prior representation proceeding because both cases were "premised on the issue of jurisdiction of the Respondent." *Verland Foundation*, 296 NLRB at 443. As the judge explained:

> In the related representation case herein, the issue of jurisdiction was hardly "subsidiary." It was primary. It was the predicate for that case, as it is this one. In the representation case the issue was fully litigated; and relitigation herein would be improper. [Id.]

representation case,[5] we find that it would be improper to relitigate the jurisdictional issue here.

We note, moreover, that the Respondent attempted to relitigate the jurisidictional issue in *Hafadai Beach Hotel*, 320 NLRB No. 24 (Dec. 19, 1995), an 8(a)(5) refusal-to-bargain case in which the Respondent sought to test the Union's certification in the underlying representation proceeding. The Board found that the Respondent had not raised any representation issue that was properly litigable in the unfair labor practice case and granted the

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[5] Although the Regional Director did not specifically characterize the Respondent's argument as a "preemption" issue in his Decision and Direction of Election, he did conclude that there is no conflict between the NWA and the NLRA that would preclude the application of the NLRA to the nonresident workers. See fn. 3, supra. The Respondent raised its preemption argument again in its request for review to the Board, which the Board denied after due consideration.

General Counsel's Motion for Summary Judgment.[6] The Respondent has presented no special evidence that would require us to reach a different result here. Thus, the issue of whether the Board properly asserted jurisdiction over a unit composed of the Respondent's resident and nonresident employees has been fully litigated in these prior proceedings. We conclude, therefore, that relitigation of this issue here would be improper. Accordingly, we find that the Respondent's first and second affirmative defenses are without merit.

Since the Respondent has withdrawn its answer to paragraphs 1 through 23 of the second amended consolidated complaint, as amended, the allegations contained

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[6] As explained in *Hafadai Beach Hotel*, slip op. at 1, fn. 2, in his March 23, 1995 Decision and Direction of Election in Case 37-RC-3687, the Regional Director applied by analogy the principles and standards set forth in *Res-Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986), and found that the Board had jurisdiction over the Respondent's nonresident workers. Although the Board, Member Cohen dissenting, subsequently overruled the *Res-Care/Long Stretch* line of cases in its July 18, 1995 decision in *Management Training Corp.*, 317 NLRB 1355 (1995), the Board thereby effectively broadened rather than restricted its jurisdiction. Accordingly, in *Hafadai Beach Hotel*, the Board found that the decision in *Management Training* provided no basis, and we find none here, for reconsidering the Regional Director's jurisdictional findings.

Member Cohen adheres to his dissenting position in *Management Training*. He agrees with the Regional Director that jurisdiction may be asserted under *Res Care* and *Long Stretch*. See *Hafadai Beach Hotel*, fn. 2, par. 2.

in the second amended consolidated complaint, as amended, must be considered to be admitted to be true.[7]

II. THE UNFAIR LABOR PRACTICE CASE

The Board has considered the stipulation, the briefs, and the entire record in this proceeding and makes the following

FINDINGS OF FACT

A. *Jurisdiction*

At all material times, the Respondent, a corporation of the Commonwealth of the Northern Mariana Islands (CNMI), with an office and place of business located in Garapan, on the island of Saipan, CNMI, has been engaged in the operation of a hotel and restaurants. During the calendar year ending December 31, 1994, the Respondent, in conducting its hotel and restaurant operations described above, derived gross revenues in excess of $500,000. During the same period of time the Respondent, in conducting its operations described above, purchased and received at its Garapan, Saipan, CNMI facility, goods and materials valued in excess of $5000, which originated from points outside the CNMI. The second amended consolidated complaint alleges, the Respondent does not deny, and we find that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[7] See, e.g., *Viox Services*, 308 NLRB 697, 697 (1992).

The second amended consolidated complaint alleges, the Respondent does not deny, and we find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

B. *Unfair Labor Practice Findings*

The second amended consolidated complaint, as amended (the complaint), alleges, the Respondent in effect admits, and we find that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to renew the annual employment contracts of the following 20 employees who engaged in protected concerted and union activities, thereby terminating these employees: (1) In September and October 1994, the Respondent failed to renew the annual employment contracts of its employees Antonio Alegre, Jose Barola, Henry Caceres, Celso Llanza, Cristeta Tupas, Peter Paul Guadalupe, Rusticio Reyes, and Joselito Sioco; (2) on about January 31, 1995, the Respondent failed to renew the annual employment contract of its employee Antonio Peciller; (3) on unknown dates in March 1995, the Respondent failed to renew the annual employment contracts of its employees Monica Cruz, Luz Dellota, Romeo Javier, Danilo Reyes, Liberto (Roberto) Andal, and Fernando Dagucan; (4) on unknown dates in April 1995, the Respondent failed to renew the annual employment contracts of employees Hermilito Trampe, Melito Garcia, Christina Ortanez, and Melvin Ortanez; and (5) on about May 30, 1995, the Respondent failed to renew the annual employment contract of its employee Danilo Ortanez.

The complaint also alleges, the Respondent in effect admits, and we find that the Respondent has further violated Section 8(a)(3) and (1) by failing and refusing to pay the above-named employees their accumulated earned vacation pay, as provided for in the employees' annual employment contracts, since about September and October 1994, and continuing to date; and by refusing to rehire employee Vincente Perez since about March 13, 1995, and continuing to date.

The complaint further alleges, the Respondent in effect admits, and we find that the Respondent has also violated Section 8(a)(3) and (1) by subcontracting out its maintenance service department positions to a temporary employment agency from about May 1994, and continuing to date; by imposing stricter and more onerous terms and conditions of employment on employees on January 17, 1995, by memorandum; by Joseph Salas', the Respondent's acting personnel manager, more closely scrutinizing the employees' performance of their work assignments on unknown dates beginning on about January 17, 1995 through March 1, 1995; and by Salas' and Shigeji Fuwa's, a chief cook, issuing written disciplinary warnings to employees regarding their work performance on unknown dates during this same period.

The complaint further alleges, the Respondent in effect admits, and we find that the Respondent violated Section 8(a)(1) of the Act on various dates beginning in May 1994 or June 1994 through January 1995, at the offices of Paras Enterprises, in Manila, Republic of the Philippines, by the Respondent's supervisors' and/or agents' warning applicants for employment that, if they were hired by the Respondent, they should not join or

support the Union; threatening employees that if they joined the Union while working for the Respondent, their employment would be terminated through discharge and/or nonrenewal of their contracts and/or that they would be deported; interrogating employees concerning their protected concerted and/or union activities; telling employees that they should not join or support the Union while working for the Respondent, and that they would be blacklisted if they joined or supported the Union.[8]

The complaint further alleges, the Respondent in effect admits, and we find that the Respondent further violated Section 8(a)(1) in September 1994 by Peter Igitol's, the Respondent's director/government relations, soliciting grievances from employees and promising to remedy them in order to discourage them from engaging in protected concerted activities; by Igitol's interrogating employees about their protected concerted activities and threatening employees with unspecified reprisals because they engaged in protected concerted activities; and by Franklin Encio's, the Respondent's maintenance supervisor, promising benefits to employees during the same period, if they renounced their protected concerted activities.

The complaint also alleges, the Respondent in effect admits, and we find that during the period between September 1994 and March 1995, the Respondent further

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[8] These threats were made variously by Peter Igitol, the Respondent's director/government public relations; and/or Seigo Horai, the Respondent's general manager; and/or Arnel Paras, Amalia Paras, Ipa Dellota, and Jema (last name unknown), all employees of Paras Enterprises in Manila.

violated Section 8(a)(1) through Encio's, Salas', Dining Room Supervisor Hilario's, Fuwa's, Horai's, and Assistant Chief Cook Sasaki's informing employees that their annual employment contracts would not be renewed because they engaged in protected concerted activities.

The complaint alleges in addition, the Respondent in effect admits, and we find that the Respondent further violated Section 8(a)(1) on various dates between November 1994 through March 1, 1995, by Teofila Dimayuga's, an agent of the Respondent, informing employees that she was conducting surveillance of employees' union activities and promising employees that their employment contracts would be renewed if they would not join or support the Union; by Dimayuga's threatening employees with reduced employment benefits and wages and nonrenewal of their contracts if they joined or supported the Union; and by her interrogating employees about their protected concerted and union activities.

The complaint alleges, the Respondent in effect admits, and we find that the Respondent also violated Section 8(a)(1) by Salas' and an unnamed agent's informing employees, on January 23, 1995, that they should not join or support the Union, and threatening employees with termination and deportation if they joined or supported the Union; by Yutaka Kurihara's, the Respondent's president, interrogating employees in about February 1995, regarding their union activities and giving employees the impression that their union activities were under surveillance; and by Toichiro Funayama's, the Respondent's dining room supervisor, interrogating employees regarding their protected concerted and union

activities on about February 17, 1995, and by his asking employees to join an antiunion employee group.

The complaint further alleges, the Respondent in effect admits, and we find that the Respondent also violated Section 8(a)(1) by Salas' promulgating in June 1994 and since maintaining a rule prohibiting discussions among employees concerning their terms and conditions of employment; and, following promulgation of this rule, by issuing written disciplinary warnings to employee Vincente Perez on June 23 and 24, 1994, because Perez violated the rule; and by issuing a verbal disciplinary warning to employee Celso Llanza on an unknown date following the promulgation of the rule because Llanza violated this rule.

Finally, the complaint alleges, the Respondent in effect admits, and we find that the Respondent, by oral announcement, by a memorandum issued on an unknown date, and by its General Manager Horai, at a staff meeting held on about November 14, 1994, violated Section 8(a)(1) by prohibiting employees whose contracts had not been renewed from visiting the Respondent's staff housing area on unknown dates beginning in about September 1994 through November 1994; and by Salas' ordering employee Vincente Perez, under threat of arrest, to leave the employees' staff housing area on an unknown date in September 1994.

Conclusions of Law

1. By interrogating employees, making various threats, soliciting grievances and/or promising to remedy

them, promising benefits, creating the impression of surveillance, denying employees whose contracts had not been renewed access to the Respondent's staff housing area and threatening employees with arrest if they did not leave the staff housing area, promulgating and enforcing a rule prohibiting employees from discussing their terms and conditions of employment, informing employees that their contracts, and the contracts of other employees, would not be renewed because they engaged in union and/or other protected concerted activity, imposing stricter and more onerous working conditions on employees, and more closely scrutinizing employees' work performance, denying vacation pay to employees, subcontracting employees' jobs, and discharging and refusing to rehire employees, refusing to renew employment contracts, and issuing disciplinary warning notices to employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By imposing stricter and more onerous working conditions on employees, and more closely scrutinizing employees' work performance, by denying vacation pay to employees, by subcontracting employees' jobs because employees engaged in union and/or other protected concerted activities; and by discharging and refusing to rehire employees, refusing to renew employees' employment contracts, and issuing disciplinary warning notices to employees, all because the employees engaged in union and/or other protected concerted activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[9]

Having found that the Respondent unlawfully discharged employees Antonio Alegre, Jose Barola, Henry Caceres, Celso Llanza, Cristeta Tupas, Peter Paul Guadalupe, Rusticio Reyes, Joselito Sioco, Antonio Peciller, Monica Cruz, Luz Dellota, Romeo Javier, Danilo Reyes, Liberto (Roberto) Andal, Fernando Dagucan, Hermilito Trampe, Melito Garcia, Christina Ortanez, Melvin Ortanez, and Danilo Ortanez, and that the Respondent has refused to rehire employee Vicente Perez, we shall order the Respondent to offer these employees immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges. If necessary, the Respondent shall apply to the CNMI's Department of Labor and Immigration for entry permits and work authorizations for these employees, in accordance with the relevant provisions of the Nonresident Workers Act and its implementing regulations. Finally, we shall order the Respondent to make

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[9] In view of the Respondent's widespread misconduct and egregious violations, demonstrating a general disregard for the employees' fundamental rights, we find that it is necessary to issue a broad order, requiring the Respondent to cease and desist from infringing in any other manner with rights guaranteed employees by Sec. 7 of the Act. *Hickmon Foods*, 242 NLRB 1357 (1979).

whole these employees for any loss of earnings as a result of the discrimination against them with backpay calculated as set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall also order the Respondent to rescind any subcontracts by which it is performing any work, including maintenance work, formerly performed by employees whose employment contracts were not renewed for discriminatory reasons. In addition, we shall order the Respondent to rescind any rules prohibiting employee discussions concerning their terms and conditions of employment, and to rescind any rules prohibiting employees whose employment contracts have not been renewed from visiting the Respondent's staff housing area. Finally, we shall order the Respondent to rescind the employee warning notices issued to Vicente Perez and Celso Llanza and to remove from its files any references to these unlawful warning notices and any references to the termination and/or failure to renew the employment contracts of the discriminatees.

ORDER

The National Labor Relations Board orders that the Respondent, Saipan Hotel Corporation d/b/a Hafadai Beach Hotel, Saipan, Commonwealth of the Northern Mariana Islands, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees regarding their union activities and support.

(b) Threatening employees with job loss and non-renewal of employment contracts and blacklisting because they engaged in union and/or other protected concerted activities.

(c) Threatening to decrease wages and benefits because employees engaged in union and/or other protected concerted activities.

(d) Threatening employees with discipline and unspecified reprisals because they engaged in union and/or other protected concerted activities.

(e) Threatening employees with discharge, failure to renew their employment contracts, and/or deportation because they engaged in union and/or other protected concerted activities.

(f) Soliciting grievances from employees and/or promising to remedy them in order to dissuade employees from supporting the Union and/or engaging in other protected concerted activities.

(g) Promising benefits to employees, including renewal of their employment contracts, if they did not join or support the Union, and asking employees to join an antiunion group of employees.

(h) Creating the impression that employees' union and/or other protected concerted activities are under surveillance.

(i) Denying employees whose contracts have not been renewed access to the Respondent's staff housing area, and threatening employees with arrest if they do not leave the staff housing area.

(j) Promulgating and enforcing a rule prohibiting employees from discussing their terms and conditions of employment.

(k) Informing employees that their contracts, and the contracts of other employees, would not be renewed because they engaged in union and/or other protected concerted activities.

(l) Imposing stricter and more onerous working conditions on employees, and more closely scrutinizing employees' work performance, because they engaged in union and/or other protected concerted activities.

(m) Denying vacation pay to employees because they engaged in union and/or other protected concerted activities.

(n) Subcontracting employees' jobs because employees engaged in union and/or other protected concerted activities.

(o) Discharging and refusing to rehire employees, refusing to renew employment contracts, and issuing disciplinary warning notices to employees because they engaged in union and/or other protected concerted activities.

(p) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Antonio Alegre, Jose Barola, Henry Caceres, Celso Llanza, Cristeta Tupas, Peter Paul Guadalupe, Rusticio Reyes, Joselito Sioco, Antonio Peciller, Monica Cruz, Luz Dellota, Romeo Javier, Danilo Reyes, Liberto (Roberto) Andal, Fernando Dagucan, Hermilito Trampe, Melito Garcia, Christina Ortanez, Melvin Ortanez, Danilo Ortanez, and Vicente Perez immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges that they previously enjoyed, if necessary applying to the CNMI's Department of Labor and Immigration for entry permits and work authorizations for these employees, in accordance with the relevant provisions of the Nonresident Workers Act and its implementing regulations, and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Rescind any subcontracts by which it is performing any work, including maintenance work, formerly performed by employees whose employment contracts were not renewed for discriminatory reasons.

(c) Rescind any rules prohibiting employees from discussing their terms and conditions of employment and any rules prohibiting employees whose employment contracts have not been renewed from visiting the Respondent's staff housing area.

(d) Rescind the employee warning notices issued to Vincente Perez and Celso Llanza.

(e) Remove from its files any references to these unlawful warnings and any references to the termination and/or failure to renew the employment contracts of the discriminatees and inform the affected employees, in writing, that it has taken such action and that the warnings and terminations will not be used against them in any way.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(g) Post at its facility in Saipan, Commonwealth of the Northern Mariana Islands, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. May 1, 1996

William B. Gould IV, Chairman

Margaret A. Browning, Member

Charles I. Cohen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you regarding your union activities and support.

WE WILL NOT threaten you with job loss and non-renewal of employment contracts and black-listing because you engage in union and/or other protected concerted activities.

WE WILL NOT threaten to decrease wages and benefits because you engage in union and/or other protected concerted activity.

WE WILL NOT threaten you with discipline and unspecified reprisals because you engage in union and/or other protected concerted activities.

WE WILL NOT threaten you with discharge, failure to renew your employment contracts, and/or deportation because you engage in union and/or other protected concerted activities.

WE WILL NOT solicit grievances from you and/or promise to remedy them in order to dissuade you from supporting the Union and/or engaging in other protected concerted activities.

WE WILL NOT promise benefits to you, including renewal of your employment contracts, if you do not join or support the Union, and WE WILL NOT ask you to join an antiunion group of employees.

WE WILL NOT create the impression that your union and/or other protected concerted activities are under surveillance.

WE WILL NOT deny employees whose contracts have not been renewed access to our staff housing area, and WE WILL NOT threaten these employees with arrest if they do not leave the staff housing area.

WE WILL NOT promulgate and enforce a rule prohibiting you from discussing your terms and conditions of employment.

WE WILL NOT inform you that your contracts, and the contracts of other employees, will not be renewed because you engage in union and/or other protected concerted activities.

WE WILL NOT impose stricter and more onerous working conditions on you, and more closely scrutinize your work performance, because you engage in union and/or other protected concerted activities.

WE WILL NOT deny vacation pay to you because you engage in union and/or other protected concerted activities.

WE WILL NOT subcontract your jobs because you engage in union and/or other protected concerted activities.

WE WILL NOT discharge and refuse to rehire you, refuse to renew your employment contracts, and issue disciplinary warning notices to you because you engage in union and/or other protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Antonio Alegre, Jose Barola, Henry Caceres, Celso Llanza, Cristeta Tupas, Peter Paul Guadalupe, Rusticio Reyes, Joselito Sioco, Antonio Peciller, Monica Cruz, Luz Dellota, Romeo Javier, Danilo Reyes, Liberto (Roberto) Andal, Fernando Dagucan, Hermilito Trampe, Melito Garcia, Christina Ortanez, Melvin Ortanez, Danilo Ortanez, and Vicente Perez immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges that they previously enjoyed, if necessary applying to the CNMI's Department of Labor and Immigration for entry permits and work authorizations for these employees, in accordance with the relevant provisions of the Nonresident Workers Act and its implementing regulations, and WE WILL make them whole for any loss of earnings and other benefits they may have suffered as the result of their discharges, plus interest.

WE WILL rescind any subcontracts by which we are performing any work, including maintenance work, formerly performed by employees whose employment contracts were not renewed for discriminatory reasons.

WE WILL rescind any rules prohibiting you from discussing your terms and conditions of employment and any rules prohibiting employees whose employment contracts have not been renewed from visiting our staff housing area.

WE WILL rescind the employee warning notices issued to Vincente Perez and Celso Llanza.

WE WILL remove from our files any references to these warnings and any references to the termination and/or failure to renew the employment contracts of the discriminatees, and WE WILL inform the affected employees, in writing, that we have taken such action and that the warning notices and terminations will not be used against them in any way.

SAIPAN HOTEL CORPORATION, D/B/A HAFADAI BEACH HOTEL

NOT TO BE INCLUDED
IN BOUND VOLUMES

Saipan, CNMI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SAIPAN HOTEL CORPORATION d/b/a HAFADAI BEACH HOTEL	Case 37-CA-3977
and	
ANTONIO ALEGRE, JOSE BAROLA, HENRY CACERES, CELSO LLANZA, and CRISTETA TUPAS, Individuals	
and	
VICENTE PEREZ, an Individual	Cases 37-CA-3978 37-CA-3983
and	Cases 37-CA-4027
COMMONWEALTH LABOR FEDERATION	37-CA-4051 37-CA-4068 37-CA-4074 37-CA-4134

ORDER TRANSFERRING PROCEEDING TO THE BOARD AND APPROVING STIPULATION

On August 8, 1995, and August 23, 1995, respectively, and order consolidating cases, second amended consolidated complaint and notice of hearing and an amendment to the second amended consolidated complaint issued in the above-entitled proceeding, alleging that the Respondent violated Section 8(a)(1) in numerous respects and 8(a)(3) by subcontracting out its maintenance service

department positions, by imposing stricter and more onerous conditions of employment on its employees, by issuing written warnings to employees regarding their performance, by refusing to rehire an employee, by failing to renew the employment contracts of certain employees thereby terminating them, and by failing and refusing to pay these employees their accumulated earned vacation pay as provided for in the employment contracts.

On August 22, 1995, and August 28, 1995, respectively, the Respondent filed its answer to the second amended consolidated complaint and an amendment to its answer. In its answer, the Respondent admits certain allegations of the second amended consolidated complaint, but denies that it committed any of the unfair labor practices alleged therein.

On September 14, 1995, the General Counsel, the Respondent, and the Charging Parties filed with the Board a stipulation and joint motion to transfer this proceeding to the Board. The joint motion states, in relevant part:

> 2. The parties hereby stipulate that the Exhibits described in paragraph 1 above, attached hereto and incorporated herein by reference, along with this Stipulation, shall constitute the entire record in this case, and no oral testimony is necessary or desired by any of the parties.
>
> 3. With the exception of Respondent's First and Second Affirmative Defenses relating to the Board's assertion of jurisdiction set forth in

Respondent's Answer, Respondent hereby withdraws the Answer it filed to the Second Amended Consolidated complaint and its Answer to the Amendment to the Second Amended Consolidated Complaint.

4. The parties further stipulate that they waive a hearing before an administrative law judge, the making of findings of facts and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision; and the parties desire to submit this case for findings of facts, conclusions of law and order directly by the Board.

5. The Respondent denies the commission of any unfair labor practices under the National Labor Relations Act because it asserts that the Board does not have jurisdiction in these cases.

Also, should the Board grant their motion, the parties request that the Board set a time for the filing of briefs.

The Board, having duly considered the matter, has decided to grant the parties' motion, and accordingly,

IT IS ORDERED that this proceeding is transferred to and continued before the Board in Washington, D.C., for the purpose of making findings of fact and conclusions of law, and the issuance of a Decision and Order.

IT IS FURTHER ORDERED that the parties' stipulation is approved and made a part of the record in this case.

The parties may file briefs with the Board in Washington, D.C., on or before December 5, 1995.

Dated, Washington, D.C., November 14, 1995.

By direction of the Board:

_____

Acting Executive Secretary

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SAIPAN HOTEL CORPORATION dba
HAFADAI BEACH HOTEL,

Employer

and

Case
37-RC-3687

COMMONWEALTH LABOR
FEDERATION and HOTEL
EMPLOYEES AND RESTAURANT
EMPLOYEES, LOCAL 5, AFL-CIO

Joint Petitioners

ORDER

Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.

JAMES M. STEPHENS,
MEMBER

MARGARET A. BROWNING,
MEMBER

CHARLES I. COHEN,
MEMBER

Dated, Washington, D.C., April 28, 1995.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

SAIPAN HOTEL CORPORATION d/b/a HAFADAI BEACH HOTEL

Employer,

and **Case 37-RC-3687**

COMMONWEALTH LABOR FEDERATION and HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES, LOCAL 5, AFL-CIO

Joint Petitioners.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act ("the Act"), as amended, a hearing was held before Hearing Officer Thomas W. Cestare of the National Labor Relations Board on February 17 and 18, 1995, in Honolulu, Hawaii.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[1]

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[1] The parties stipulated, and I find, that the Employer is a corporation of the Commonwealth of the Northern Mariana

3. The labor organizations involved claim to represent certain employees of the Employer.[2]

4. A question concerning commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.[3]

5. *The Appropriate Unit.*

Joint Petitioners seek to represent a unit composed of:

> All employees of the Employer employed in the Commonwealth of the Northern Mariana

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Islands (CNMI), with a facility located in Garapan, on the island of Saipan, CNMI where it is engaged in a business of operating a hotel and restaurants in Garapan, Saipan in the Commonwealth of the Northern Mariana Islands (CNMI). During the past twelve months, in the course and conduct of its business operations, the Employer has derived gross revenues in excess of $1,000,000.00, and during this same time period has received goods and materials valued in excess of $50,000 directly from suppliers located outside the CNMI. Based on the parties' stipulation to such facts, it is concluded that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes and policies of the Act to assert jurisdiction herein.

[2] The parties stipulated, and I find, that Joint Petitioners, Commonwealth Labor Federation, and Hotel Employees and Restaurant Employees, Local 5, AFL-CIO, are each labor organizations within the meaning of Section 2(5) of the National Labor Relations Act.

[3] The Employer declines to recognize the Joint Petitioners, as the representative of its employees in any unit until an election is conducted. The parties stipulated, and I find, that there is no history of collective bargaining between the Employer and either of the two Joint Petitioners.

Islands, excluding all managers, professionals and confidential employees, guards and supervisors as defined in the Act.

There are 141 employees in this unit (including five employees, listed below, whom the parties have agreed may vote subject to challenge).

The parties stipulated, and I find, that the following individuals are supervisors within the meaning of the Act and are therefore properly excluded from any collective bargaining unit found to be appropriate:

Yutaka Kurihara - President

Juan Guerrero - Vice President

Seigo Horai - General Manager

Peter J. L. Igitol - Director/government public relations

Toshiichi Kase - Assistant General Manager

Mariano Sablan - Night Manager

Kenji Seo - Office Manager

Eduardo Pangilinan - Accounting Manager

Kimie Hikosaka - Accounting Supervisor

Hidenori Moriyama - Chef, Japanese Cuisine; Chief Cook, Hana Restaurant

Kiyomasa Shiroma - Assistant Chief Cook, Hana Restaurant

Thomas Dela Cruz - Chief Cook, Teppanyaki Restaurant

Shigeji Fuwa - Chef, Western Cuisine; Chief Cook, Dolphin Restaurant,

Cafeteria and Tropicana Restaurant

Tomohiro Morimura - Supervisor Cook, Dolphin Restaurant, Cafeteria and Tropicana Restaurant

Tadao Kumagai - Food and Beverage Manager

Osamu Hirano - Food and Beverage Assistant Manager

Toichiro Funayama - Dining Room Supervisor (Floats)

Leonida Cabrera - Dining Room Supervisor (Tropicana Restaurant)

Robert Hilario - Dining Room Supervisor (Dolphin Restaurant)

Nobuyasu Koruzumi - Waiter Supervisor (Floats)

William Cachero - Maintenance Manager

Franklin Encio - Maintenance Supervisor

Hideyuki Hikosaka - Housekeeping Manager

Juliana Cabrera - Housekeeping Assistant Manager

Shigeo Matsushima - Front Office Manager

Matsuyuki Okuda - Sales Manager

Teresita Matsumoto - Reservation Assistant Manager

Osamu Kobayashi - Front Desk Supervisor

Naomi Suzuki - Front Desk Supervisor

Tomoaki Suzuki - Front Desk Supervisor

Tadashi Fujigasaki - Front Desk Supervisor

Manuel Villagomez - Purchasing Manager

Dolores Camacho - Purchasing Supervisor

Joe S. Salas - Acting Personnel Manager; Assistant Personnel Manager

Lucinda Hocog - Assistant Personnel Supervisor

Kiyoaki Suzuki - Custodian Manager

The parties also stipulated, and I find, that four employees employed as accountants, are confidential employees and should also therefore be excluded from any unit found to be appropriate:

Maria De Guzman	Magdelena Quinto
Edgardo L. Clemente	Jovita V. Agliam.

The parties also stipulated that the following employees will vote under challenge, because there is a question concerning whether they are supervisors under Section 2(11) of the Act:

Maria Taitano - Housekeeping Supervisor

Maria Eugenio - Housekeeping Supervisor

Lourdes Dejillas - Housekeeping Supervisor

Mary Grace Towai - Front Desk Assistant Supervisor

Jackilyn Ruan - Front Desk Assistant Supervisor

6. *Jurisdictional Issue Relative To The Nonresident Workers:*

Introduction: The Joint Petitioners ("the Union") seek to represent all of the employees[4] employed by the Employer, the Hafadai Beach Hotel, which is one of approximately five luxury hotels in Saipan, an island which is part of the Commonwealth of the Northern Mariana Islands. These employees include both resident workers and nonresident workers. There are presently 94 nonresident workers (2/3)[5], and 47 resident workers (1/3) in the petitioned-for unit.

This case is unique in that it arises in the CNMI, which is a territory of the United States. There are three major islands in the CNMI: Saipan, Rota and Tinian. There are approximately 43,000 people living in the CNMI, the overwhelming majority of whom live in Saipan. The indigenous residents of the CNMI comprise approximately 17,000 individuals, and are divided into two ethnic groups, Chamorro and Carolinian. These indigenous residents, along with their immediate relatives, are United States citizens. Of the local "resident" population, approximately 7500-8000 are in the workforce, with approximately 3500 residents employed by the

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[4] As set forth previously, the parties have stipulated, and I have found, certain employees statutorily excluded from the unit.

[5] The record establishes that the majority of the contract employees working for the Employer are recruited from the Republic of the Philippines, and are employed as cooks, bartenders, waiter/waitresses, storekeepers, purchasing clerks, cashiers, kitchen helpers, dishwashers, housekeepers, or maintenance employees. The directors, managers and supervisors of the Hotel are primarily contract workers recruited from Japan or Chamorro (Chamorran).

local government. The remaining population is comprised of "nonresident workers",[6] who are not U.S. citizens.

As set forth more fully below, while most U.S. laws, including the Act, apply in the CNMI,[7] the CNMI was permitted to retain its authority over immigration. Under CNMI law, "nonresident workers" (referred to herein as "nonresident workers" or "contract workers") are alien, non – U.S. citizen contract workers, who have been recruited or entered the CNMI for employment purposes. These "nonresident workers" reside in the CNMI for the duration of their employment and may, in certain circumstances (described *infra*), continue to reside there after such employment has ceased. These nonresident workers may only enter the CNMI to work if they have secured

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[6] "Nonresident" or "contract" workers are employed primarily in tourism-related industries (hotels and restaurants), as well as in the garment industry. Contract workers are also employed as farmers or housekeepers. The vast majority of alien contract workers emigrate from the Philippines, although increasing numbers of contract workers from China, Bangladesh, Thailand and other countries are emigrating to the CNMI. There are also some contract workers from Japan living in the CNMI, who are generally employed in managerial or supervisory classifications (T. 354-6, 361-2).

[7] Joint Resolution Approving the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" (herein called the Covenant), 24 March 1976, Pub. L. 94-241, 90 Stat. 268, reprinted at 48 U.S.C. Section 1681 note. This Covenant was proclaimed to be in effect by the President on January 9, 1978 (Proc. No. 4534, Oct. 24, 1977, 42 F.R. 56593); *Micronesian Telecommunications*, 273 NLRB 354 (1984), enfd., 820 F.2d 1097, 125 LRRM 3102 (9th Cir. 1987).

employment and, while working for an employer, they must work pursuant to an employment contract. While working for an employer pursuant to an employment contract, they have the status of legal aliens residing in the CNMI. Under CNMI law, however, these individuals may not gain U.S. citizenship by virtue of employment in the CNMI.

Under CNMI law, the "resident workers," also referred to as "locals," are citizens or nationals of the United States as defined in the Constitution of the CNMI or those individuals who have been granted national or citizenship status pursuant to Commonwealth law (i.e., the indigenous population of the CNMI, who are the Chamorros or Carolinian peoples, or their immediate relatives), or those individuals who are legally residing without restrictions as to employment in the CNMI (i.e., residents of the Federated States of Micronesia, who are not U.S. citizens).

This is the first known instance in the history of the CNMI where a labor organization has petitioned, pursuant to the Act, to represent employees in a unit which included nonresident, or contract workers. The issue squarely presented in this case is whether the nonresident workers employed in the CNMI are "employees" within the meaning of the Act. For the reasons set forth below, I find that the "nonresident" or "contract" workers employed by the Employer are "employees" covered by the Act, and that inclusion of these employees in the same bargaining unit with the Employer's resident workers is appropriate for purposes of collective bargaining.

Position of the Parties:

(i) ***Employer's Position***: The Employer concedes that generally, under *Micronesian Communications*, the Board has jurisdiction over employers doing business in the CNMI. The employer further agrees that its resident employees are "employees" subject to the Act's coverage. The Employer argues, however, that *Micronesian Telecommunications* is inapplicable here, because that decision did not address the applicability of the Act to nonresident workers. Section 503(a) of the Covenant specifically permitted the CNMI to continue to control the admission of aliens into the CNMI. The Employer argues first that the Board should exercise its discretionary power and decline to extend the Act's coverage to the nonresident workers because under the Covenant, the CNMI expressly retained immigration authority, and thus, this case involves a political controversy over the intent and interpretation of the Covenant between two governments.

The Employer also maintains that the Act is not applicable to nonresident workers because the Act conflicts with the legislative control the CNMI exercises over the nonresident workers through the Nonresident Workers Act ("NWA"), which is the CNMI statute regulating contract workers. Because the CNMI retains control over immigration pursuant to the Covenant, and because certain constitutional rights do not apply in the CNMI,[8]

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[8] Citing *Com. of Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984), *cert. denied, Atalig v. Northern Mariana Islands*, 467 U.S. 1244 (June 11, 1984); *Wabol v. Villacrusis*, 958 F.2d 1450 (1990), *cert. denied, Philippine Goods, Inc. v. Wabol*, 113 S. Ct. 675 (Dec. 7, 1992).

the Employer maintains that in the event of a conflict between the NWA and the Act, the NWA controls. The Employer claims that the NWA and the Act conflict in the following respects.

The Employer argues that if the two laws, the NWA and the Act, are both applied to nonresident workers, the results could be "devastating". In support, the Employer argues that the NWA's requirement that employers must employ residents, if available for work, over nonresidents would be construed as "discriminatory" under the Act, and that a union might be guilty of failing in its duty to represent fairly all of its members if it did not challenge this resident preference.

The Employer also argues that the NWA's requirement that the CNMI's Department of Labor and Immigration (DLI) must approve employment contracts entered into between employers and nonresident workers conflicts with the Act, because application of the Act would create a "3-party system" (the CNMI government, the Employer and the Union). In essence, the Employer is contending that because of the procedures imposed by the DLI with respect to hiring and renewal of applications, review of changes in job assignments, promotions, compensation, transfers of employment, and terminations, the Employer is unable to conduct meaningful negotiations with the Union concerning the terms and conditions of its nonresident workers.

The Employer also maintains that the Act should not apply to the nonresident workers because it would result in an unequal balance of economic strength in the event of a strike. Given the composition of the work force, the

Employer argues that in the event of a strike, the Employer could not obtain replacements without going through the entire hiring process under the NWA.

While the Employer acknowledges that the U.S. Immigration and Naturalization Service (INS) also imposes requirements on hiring temporary alien workers,[9] the Employer maintains that the purpose and application of the two procedures for approving temporary workers is totally different. The Employer states that in the U.S., where there are over 123,000,000 workers in the labor force, not including the unemployed, temporary workers are the exception. Thus, U.S. immigration laws protect the local workers by severely limiting the number of temporary workers admitted to the country, by removing any incentive to hire temporary workers by requiring that they and the U.S. workers receive the same terms and conditions of employment.

In direct contrast, the Employer argues, in the CNMI, where the resident labor pool "is much too small, ***nonresidents are the rule***". Thus, the Employer's argument continues, the CNMI government protects resident workers by mandating a preference for residents and by constantly monitoring all aspects of the employment of all nonresidents so that residents can be apprised of jobs, in case a resident should decide to take a nonresident's job using his/her preference.

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[9] Under U.S. immigration laws, "H-2" refers to the category of visas issued to non-immigrant workers in agricultural (H-2A) and nonagricultural (H-2B) industries who are being admitted to the U.S. to work under temporary labor certifications. See 20 CFR Sec. 655.1 et seq.

Finally, the Employer contends that, because of the extensive administrative process for investigating and resolving employment complaints for nonresidents established by the DLI, this could result in conflicts between Board decisions on employment and cases decided by DLI. The Employer thus maintains that unless a determination is made that the Act preempts the NWA, preemption would not be available under Section 301, and the Employer would be faced with the prospect of having to comply with conflicting Board and DLI orders.

(ii) ***Joint-Petitioner's Position***: Joint Petitioners argue that it is clear that the Act applies to the CNMI, pursuant to Section 502(a)(2) of the Covenant, as decided in *Micronesian Telecommunications, ("Micronesian")*. The Joint Petitioners maintain that pursuant to the Covenant, federal laws apply in the CNMI, with the exception of immigration laws and certain jurisprudential, procedural aspects of federal law. Cases dealing with these latter aspects of federal law are not relevant, because the Covenant specifically excepted these types of laws from application in the CNMI.

Moreover, Joint Petitioners argue that the Supreme Court decided in *Sure Tan v. NLRB*[10] that aliens, including undocumented or illegal aliens, constitute employees under the Act. Joint Petitioners maintain that while the CNMI has retained authority to regulate immigration, to the extent that the CNMI's regulation of immigration conflicts with the Act, the Act preempts, pursuant to the

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[10] *Sure Tan v. NLRB*, 467 U.S. 883, 116 LRRM 2857 (1984).

Supremacy Clause of the U.S. Constitution, which applies in the CNMI[11].

While the Joint Petitioners acknowledge that the Nonresident Workers Act closely regulates employment conditions of nonresident workers, there are also elaborate statutory regulatory schemes, including the requirements of the Occupational Safety and Health Act (OSHA), the Equal Employment Opportunity Act (EEOA) and various state statutes which apply in the United States. The Joint Petitioners argue that these mandatory regulatory schemes do not prevent employers and unions from engaging in meaningful collective bargaining in the states, and thus, do not preempt the rights of employees to engage in collective bargaining under the Act. Under the Act, since parties cannot include unlawful provisions in a collective bargaining agreement, the parties simply must incorporate and/or take adequate measures to ensure that these regulatory laws are followed, within the context of collective bargaining.

Finally, the Joint Petitioners maintains that the Employer's real goal here is to perpetuate a system wherein immigrant contract workers are exploited and employed in near-slavery conditions. The Joint Petitioners also posit that the Employer's position runs directly contrary to the stated legislative purpose of the NWA, which is to protect the citizens of the CNMI. By denying contract workers their rights under the Act, Joint

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[11] Citing *U.S. ex rel. Richards v. De Leon Guerrero*, 1992 WL 321010 at 21, 28 31 (N. Mariana Islands 1992), affd., 4 F.3d 749 (9th Cir. 1993).

Petitioners contend that this permits continued exploitation of contract workers and perpetuates a system wherein U.S. citizens are deprived of better employment opportunities. This is because CNMI employers are more likely to employ poorly paid and voiceless contract workers, rather than resident workers who have the right to organize under the Act.

Background: In *Micronesian Telecommunications,*[12] the Board held that the National Labor Relations Act is applicable to employers whose businesses affect commerce in the CNMI. As set forth in *Micronesian,* from 1947 through 1986, the United States administered the Northern Mariana Islands as part of the United Nations Trust Territory of the Pacific Islands (TTPI). In 1976, the United States and Northern Mariana Islands entered into a "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America".[13]

The Covenant establishes the Commonwealth and defines its political relationship with the United States. *Fleming v. Department of Public Safety, Com. of Northern Mariana Islands,* 837 F. 2d 401, 403 (9th Cir. 1988), *cert denied, Department of Public Safety, Com. of Northern Mariana Islands v. Fleming,* 488 U.S. 889 (1988). The CNMI is a self-governing commonwealth under the United States sovereignty. *Com. of Northern Mariana Islands v. Atalig,*

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[12] 273 NLRB 354 (1984), enfd., 820 F.2d 1097, 125 LRRM 3102 (9th Cir. 1987).

[13] See 48 U.S.C. Sec. 1681.

supra. It is well-established that pursuant to the Covenant, the CNMI is subject to federal sovereignty, unless specifically exempted.

Article I (Political Relationship of the Covenant) describes the basic relationship between the US and the CNMI.[14] Under Section 101, the CNMI is a "self-governing commonwealth" in political union with and under the sovereignty of the United States. Section 102 provides that relations between the CNMI and the U.S. will be governed by the Covenant, which "together with those provisions of the Constitution, treaties and laws of the United States applicable" to the CNMI, will be the supreme law of the CNMI. Section 103 guarantees the right of local self-government to the people of the CNMI.[15]

Sections 501 and 502 discuss the applicability of the United States law in the CNMI. Section 501 provides that

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[14] Under Section 104 the United States assumes responsibility for all matters related to foreign affairs and under defense. In Section 105 it is agreed that only legislation which is also applicable to the several States can apply in the CNMI. The "fundamental provisions" of the Covenant (Articles I, II and III and Sections 501 and 805) may be modified only with the consent of the US and the CNMI. Article II sets out the provisions for the formulation of a Constitution for the people of the CNMI. Article III guarantees U.S. citizenship to persons born in, citizens of and residents of the TTPI. Section 501 is discussed *infra*.

[15] In cases where the courts have reached substantive issues, the courts consistently have found that federal laws apply in the CNMI. See *Hillblom v. United States*, 896 F.2d 426 (9th Cir. 1990); *A & E Pacific Const. Co. v. Saipan Stevedore Co.*, 888 F.2d 68 (9th Cir. 1989).

that certain provisions of the Constitution apply in the CNMI "to the extent that they are not applicable of their own force".[16] Covenant Sections 105 and 502 establish that all federal laws (which apply to the several states and to Guam), unless specifically exempted in the language of the Covenant itself, apply in the CNMI. The Covenant specifically exempts the "immigration and naturalization laws of the United States" from applying in the CNMI (Section 503[a]).[17] Pursuant to Section 503(a) of the Covenant,[18] the CNMI controls immigration and naturalization within its borders. In the CNMI, the immigration statute regulating contract workers is the NWA.[19]

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[16] See *Hillblom v. United States, supra.*

[17] Section 503 provides in relevant part:

> The following laws of the United States, presently inapplicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement:
>
> > (a) except as otherwise provided in Section 506, the immigration and naturalization laws of the United States; . . .

Under Section 503, the minimum wage and hour provisions applicable in the U.S. do not apply to the Northern Mariana Islands.

[18] While the CNMI has authority to control immigration in the CNMI, this is a limited grant of authority, and it falls within the overall context of U.S. sovereignty. Section 503(a) is not one of the "fundamental provisions" listed in Article I, Sec. 105 of the Covenant. Thus, this grant of immigration authority may be changed or revoked by Congress without the consent of the CNMI.

[19] 3 Commonwealth Code, Div. 4, Chapter 4.

The NWA.[20] It is part of the overall purpose and policy of the NWA that "residents be given preference in employment and that any necessary employment of nonresident workers in the Commonwealth not impair the wages and working conditions of resident workers." 3 CMC Sec. 4411(a). In enacting the NWA, the CNMI Legislature recognized the "need for alien labor at the present state of economic development," but that the employment of nonresident workers "should be temporary and generally limited to the duration of the specific job or employment for which the alien was recruited." 3 CMC Sec. 4411(a). Section 4413 of the NWA also provides that "nonresident workers shall be employed only as necessary to supplement the available labor force." That section further mandates that the hiring of any nonresident worker must be "in strict accordance with the provisions of this Chapter and any rule or regulation issued under this Chapter." Section 4411(b) also provides that nonresident workers must constitute at least 20% of every employer's management, supervisory and non-supervisory work force.

Under Section 4421(a) the Chief of Labor is required to establish and maintain a system of registration, referral and other employment services to assist potential resident workers in obtaining employment and assist employers in locating resident workers. That section also

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[20] The requirements of the Nonresident Workers Act will be cited as by relevant section, e.g. 3 CMC §4434. The requirements of the Alien Labor Rules and Regulations (ALRR), dated April 5, 1988, will be cited by page and paragraph, e.g. ALRR p. 5512 ¶1(a). Any amendments to the NWA or ALRR will be cited by official title and date.

provides that the Chief of Labor will establish or recommend methods for alleviating shortages of resident workers and reducing the need for nonresident workers. Moreover, Section 4421(c) states that the Chief of Labor shall "[o]versee, monitor and review the use of nonresident workers and all matters related to such use, including the health, safety, meals, lodging, salaries and working hours and conditions of such workers, and the specific contractual provisions for the services or labor of such workers." Finally, the Chief of Labor was given the task of enforcing the provisions of the NWA.

The NWA places some restrictions on the job classifications in which nonresident workers may be employed, prohibiting the employment of nonresident workers in certain categories, and providing that nonresidents may only be hired on a one-to-one ratio for other job categories.[21] A resident is considered qualified for a job if he can perform the job duties with no more than three months on-the-job training. See ALRR p. 5512-13 Sec. (A)(1)(c-d). The NWA also provides that the provisions relating to preference for hiring resident workers may be waived. 3 CMC Sec. 4440.

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[21] Sec. 4434(e) of the NWA provides that contract workers may not be hired in the following job classifications: taxi cab driver, secretary, bookkeeper, accounting clerk, messenger, receptionist, surface tour boat operator, bus driver, telephone switchboard operator. Contract workers may be hired on a one-to-one basis with residents in the following classifications: retail trade clerk or cashier, hotel front desk clerk, janitor, security guard, custodian, tour guide. *Id.* Contract workers may not be hired for positions in the CNMI government except in 10 different categories as listed. *Id.*

If an employer desires to employ nonresident workers, Section 4431 of the NWA provides that the employer must notify the Chief of Labor and report the vacancies the employer wishes to fill. In doing so, the employer must state the place and nature of the employer's business, the number of workers desired, the occupational qualifications of these workers,[22] the wages to be paid, and any other information the employer deems appropriate.

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[22] The NWA regulations provide that the requisite job qualification requirements for a job vacancy "shall be in accordance with the Dictionary of Occupational Title (DOT) and Guide to Occupational Exploration (GOE)." ALRR, Sec. II(A)(1)(c) at p. 5512-13. This requirement is contained in the same paragraph which provides that a resident worker who applies with an employer to fill a job vacancy shall be determined to be available and qualified for the job vacancy if the worker can perform with minimal (not more than 3-months of on-the-job training), the duties involved. The requirement to describe the job qualifications for a particular job category in accordance with the DOT and GOE is apparently required to ensure that the job description relates to and is necessary to perform the particular job classification, in order that resident workers are appropriately and fairly considered for these job vacancies.

The Employer presented testimony, however, that the CNMI's Labor Department accepts such job descriptions, so long as the description is "related" to the job category. Further, Section 4431 of the NWA provides that the chief may "require the employer to justify any occupational qualification as appropriate to the nature of the position." This infers that an employer may place additional job requirements, which are not contained in the DOT or GOE, on the job vacancy form, so long as the Employer can demonstrate that they are "related" to the job category.

If the Chief of Labor is unable to refer sufficient residents to fill these vacancies, then the employer is required to advertise[23] both in the newspaper and on radio or television for a period of 15 days to fill such vacancy. Upon a finding by the Chief of Labor or his designee that resident workers are not available to fill a job vacancy, the employer may file an application to employ a nonresident worker by submitting the following documents: (a) the job vacancy announcement (DOL Form 88-001); (b) copy of any applicable business license; (c) radio/TV certification (DOL Form 88-003); and (d) Employer's Application and Nonresident Employment Agreement.

Section 4433 sets forth the requirements and procedures for the filing of a nonresident employment agreement. This employment agreement is entered into between the CNMI's DLI and the employer, and must set

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[23] Section 4432 of the NWA provides that any such vacancy notices shall be published for a period of 15 days. That Section also provides that publication shall be "by advertising in a newspaper of general circulation in the Commonwealth, the use of the public media when appropriate, and any other means as the chief may determine to be feasible." The CNMI regulations provide that the Chief may cause vacancies to be publicized for a period of thirty (30) days through advertisement in a newspaper, broadcasting in local radio or television and posting of such vacancies in at least three public places in the Commonwealth. See ALRR Sec. II(A)(2)(a) at p. 5513-14.

The NWA and regulations appear to require advertising of the job vacancy both in a newspaper and radio or television, but the length of time for which the vacancy must be advertised is unclear. The documentary evidence provided by the Employer in this regard is incomplete and contradictory and does not permit a finding on this issue.

forth: (a) the number of nonresident workers needed and the commencement date; (b) occupational category or job title along with any qualifications; (c) the specified wages for each job category; (d) a statement that the employer agrees to comply with the conditions stated in the agreement, which are the minimum employment conditions required by the NWA; (e) the period of time for which the employer will be allowed to fill any position before the employer must attempt to locate a resident worker for the position by again complying with the provisions of the NWA;[24] (f) a statement that any contract offered to a

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[24] This provision appears to contemplate that an employer may request authorization to employ a certain number of workers for more than one year without having to readvertise the job vacancy every year after the non-resident worker's employment contract has expired. Indeed, it appears that the DLI approves such requests, because the record shows that the Employer has employed many contract workers for over four years.

A requirement that an employer must readvertise for the positions each year prior to seeking renewal of a non-resident's employment contract also is not required under the NWA or its regulations. Section 4432 provides for advertisement of the "job vacancies" an employer wishes to fill. The NWA's regulations state the procedures for renewal of a labor certificate as follows: a) payment of application fee; b) application for renewal of labor identification certificate, including supporting documents; and c) labor Identification Certificate (work permit) and entry permit. The Application for Renewal of a Labor identification certificate form does not state a requirement to attach proof of advertising the position. The Application Form to Employ Nonresident workers, however, contains a provision that within nine months of the date of the Application, the Employer shall make a bona fide effort to locate qualified resident workers to replace any non-resident workers and shall advise the chief of Labor and Chief of Employment Services in

nonresident worker shall be contingent upon approval by the chief; (g) a copy of a draft nonresident employment contract form; and (h) a statement that the employer will secure a bond as provided by the NWA.

Once an employer's application is approved to hire nonresident workers, the employer must then submit: (a) the employment contract between employer and nonresident worker; (b) nonresident worker's affidavit; (c) a statement of compliance that the employer employs at least 20% residents (3 CMC 4436(a)); (d) a statement of compliance with 3 CMC 4434(g), if applicable;[25] (e) proof of availability of work covering a minimum period of 6 months; (f) living quarters or housing inspection clearance; and (g) payment of application fee.

The requirements for the employment contract between an employer and a nonresident worker are that it must specify the same occupational category or job title; term of employment; location of work; work schedule; wage scale for regular and overtime work; and any deductions from pay, as may be required by law. The job title and wage rate must be the same as the information contained in the job vacancy announcement, except that the wage rate may be lower, but not higher, than that

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writing of efforts taken in locating qualified resident workers. This does not state, however, that the same method of advertisement must be used, nor does it state the length of time for which the position must be advertised.

[25] Section 4434(g) of the NWA requires the employer to submit a statement that no non-resident workers previously employed by him are still in the Commonwealth beyond the time periods specified in that section.

which was announced (3 CMC Sec. 4433(g)). The only other matter which must be contained in the employment contract is specific itemization of any deductions to be made from the employee's salary, and expenses for room and board may only be included if the expenses listed are actually incurred by the employer in providing such benefits. 3 CMC 4434(c).

The employer is required to provide medical insurance or payment of all medical expenses, and the cost of repatriating the employee to his country of origin (3 CMC Sec 4437(c), 4440).[26] Items such as food and lodging are not required to be placed on the employment contract, unless the employer has agreed to provide those items.[27]

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[26] There is no requirement that transportation to the CNMI be paid by the employer, but the Employer does this routinely for its contract workers.

[27] There is no requirement in the NWA that room and board be provided, except that free housing must be provided if a contract worker is earning less than the minimum wage, and housing must be provided to agricultural workers or domestic workers (ALRR at 5518). The employer may deduct a maximum of $100 per month from wages for housing and $100 for food. The employee may voluntarily elect to accept or withdraw from employer-provided food and housing, in a written statement in his/her native language. (See ALRR Amendment, 5-23-94).

The Employer does provide housing. Currently there are about 131 contract workers living in Employer provided housing, with some contract workers providing their own housing. There are separate "barracks" for Japanese and Filipino contract workers. Contract workers may not bring their families to the CNMI unless they earn over $20,000 per year. None of this Employer's Filipino workers meet this requirement. The housing is inspected periodically by the Labor Department.

There is also no requirement in the law that the employment contract contain provisions related to termination for cause, the grievance procedure, and the provision of transportation to and from work.

Contrary to the testimony of the Employer, neither the NWA nor the regulations provide that a specific employment contract must be used. While the regulations specify that the employment contract (DOL 88-005) be submitted to Labor, along with the other documents, this form, like all of the forms listed in the ALRR, may be waived (ALRR, Sec. VII, p. 5527).

The affidavit from the nonresident worker must show that the worker has two years' experience in the occupational field for which he/she is hired (or in any field for unskilled jobs); that the worker meets the occupational qualifications as advertised; must state marital status and identity of dependents; and that the worker has not been convicted of a felony (which latter provision may be waived). See 3 CMC Sec. 4434(b).

Once these forms are submitted to Labor by the employer, Labor reviews the documentation and either approves the hiring of a nonresident worker, or prepares a notice of deficiencies within 30 days. Labor determines whether the job classifications, occupational qualifications and experience are reasonably related, and determines whether all of the required forms have been submitted and are filled in completely. See 3 CMC Sec. 4434(e).

The NWA contains a provision that no employer may make any other agreement, nor change any existing contract, without the approval of the Chief of Labor. This

section further provides that a nonresident worker shall not work except pursuant to an approved contract or approved changes to such contract. See 3 CMC Sec. 4437(d).[28]

Once the employment contract is approved, the employer must provide Labor a bond. Labor then issues a Nonresident Worker Certificate and Alien Registration Identification Card, both effective for one year. See 3 CMC Sec. 4435; ALRR Sec. II(d)(2) at p. 5516. Contract workers must also present a health certificate upon arrival in the CNMI, and must undergo a physical examination paid for by the employer within 10 days after entry into the CNMI. See 3 CMC Sec. 4438.

There is no explicit requirement in the NWA that contract workers be terminated for cause only.[29] The law merely states that if a contract worker is terminated for cause, the employer shall give written notice to the worker and to Labor at least 10 days prior to the worker's expected departure from the CNMI. ALRR p. 5518¶ E.

Contrary to testimony, there is no requirement in the law that contract workers be provided a minimum of 40

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[28] A contract worker may not remain in the CNMI once the employment contract has expired, or if she/he is no longer employed by the approved employer. There are certain exceptions (i.e. if the worker has filed a claim with Labor for violation of the employment contract, or has filed other civil or criminal claims, or claims violations of any Commonwealth or federal labor law; or if the worker is to appear at a trial.) 3 CMC § 4434g.

[29] The form employment contract has language regarding termination for cause, but this is not a statutory or regulatory requirement.

hours per week, nor that they be provided one day off per week. While this requirement is included in the DOL employment contract, and may be "unofficially" required by Labor, it is not required in the statute or regulations. A contract worker may only work for the employer with whom he is contracted, but may secure an additional contract, or be subcontracted out as a worker, with approval of Labor. 3 CMC § 4437(e)(1).

There is no time limit in the NWA regarding the length of time that contract workers may remain in the CNMI, so long as their employment is certified pursuant to the requirement of the law. Each labor certification and employment contract is only good for one year. Former restrictions limiting contract workers to four years have been repealed. Contract workers may be promoted or transferred so long as new documentation is submitted to Labor. In the instant case, most contract workers have been employed from two to five years.

The NWA provides that the employer must maintain and provide Labor with records concerning contract workers, including identity, job titles, wage rates, payrolls, accidents, illnesses, etc. 3 CMC § 4440; ALRR p. 5522. The NWA also establishes investigatory and enforcement provisions. Contract workers may file claims, and may be entitled to hearings concerning alleged violations. Remedies include cancellation or modification of the nonresident worker certificate, employment contract or employment agreement, transfer to another employer, or any other sanction, order or relief. 3 CMC § 4441-4; ALRR pp. 5523-26. Civil actions may also be instituted. 3 CMC § 4447. In the past year and a half,

there have been no Labor hearings concerning employee complaints for this Employer.

Summary of Analysis: I find that the nonresident or contract workers employed by the Employer are "employees" covered by the Act, and further, that a unit consisting of these employees and the Employer's resident workers constitutes an appropriate unit. As explained more fully below, the Board held in *Micronesian Telecommunications*, that it has jurisdiction over employers doing business in the CNMI.[30] Further, the Supreme Court found in *Sure Tan* that alien workers, even undocumented or illegal aliens employed in the United States, are covered under the Act.[31]

Thus, the specific issue presented to me for decision is whether, because of the CNMI's regulatory scheme governing immigration, the nonresident workers in the CNMI should not be provided the same protections accorded to illegal aliens in the U.S., who are covered under the U.S. immigration system. Contrary to the Employer's contentions, I find, based on the Board's reasoning applied in its *Res Care/Long Stretch* line of cases,[32] nothing in the CNMI's immigration law and regulations which would prevent the Employer from conducting meaningful bargaining with the Union.

Application of Analysis Contained in *Micronesian Telecommunications* and *Sure-Tan:*

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[30] 273 NLRB at 357.

[31] 116 LRRM at 2861-62.

[32] *Res-Care, Inc.*, 280 NLRB 670 (1986); *Long Stretch Youth Home*, 280 NLRB 678 (1986).

As the Employer readily concedes, the Board in *Micronesian Telecommunications* held that employers engaged in commerce in the CNMI[33] are subject to the Board's jurisdiction, and that resident workers are clearly covered under the Act. As the Employer points out, that case involved resident workers in the CNMI and did not specifically address the issue presented in this case, which is whether the Act should apply to nonresident workers.

Micronesian Telecommunications, however, set forth the important principle that "Congress clearly expressed its affirmative intention of applying the National Labor Relations Act to the Northern Mariana Islands."[34] While the Employer argues in its brief that the Board should exercise its discretion and decline to apply the Act to the nonresident workers because the CNMI has retained power over immigration, the Employer presents no compelling reasons for doing so. The arguments the Employer has presented here are the same arguments which were presented to the Board in *Micronesian Telecommunications*, which arguments were rejected by the Board.[35]

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[33] These employers, of course, must satisfy the Board's jurisdictional standards, as do the operations of the Employer involved here.

[34] 273 NLRB at 356.

[35] The Employer, for instance, relies on *Contract Services*, 202 NLRB 862 (1973), wherein the Board declined to assert jurisdiction over a government contractor in the Panama Canal Zone. As the Board explained in *Micronesian Telecommunications*, the Board declined to assert its statutory jurisdiction in the Panama Canal Zone because there were at the time ongoing

I also reject the Employer's argument that I should decline to apply the Act to the nonresident workers because "[t]his case is related to a continuous political conflict between the US and the CNMI over the intent and interpretation of the Covenant," because as I find below, there is no conflict between the Act and CNMI's immigration law as codified in the Nonresident Workers Act and its implementing regulations. Thus, application of the Act to the nonresident workers will not interfere with the CNMI's "sovereignty over immigration."[36]

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negotiations about the scope and effect of United States presence there. Here, in contrast, negotiations about the status of the Northern Mariana Islands have concluded and resulted in an approved covenant setting forth the terms of the relationship between the Northern Mariana Islands and the United States. This same principle explains why the Board declined to exercise jurisdiction in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), over an employer who employed alien workers on a foreign flag vessel, which involved an "internationally charged situation." Thus, the Employer's reliance on *McCulloch* is also misplaced.

[36] As the Employer acknowledges, under Section 503 of the Covenant, Congress has authority to revoke the CNMI's sovereignty over immigration. The Employer requests that the Board take judicial notice of H.R. 602 ("the Omnibus Territories Act"), which is legislation introduced by Rep. Elton Gallegly to revoke the CNMI's authority to control its own immigration and to transfer authority over the CNMI's immigration to the U.S. Immigration and Naturalization Service ("INS"). The Employer argues that, given the political "negotiations" over CNMI's immigration authority, and the language of Section 503(a) of the Covenant, in which the U.S. Congress retained the power to determine whether the CNMI should retain sovereign control over immigration, it would be imprudent for the Board to apply the Act to the non-residents at this time. Because I find that there does not exist a conflict between application of the

The Supreme Court clearly established in *Sure Tan* that alien workers, including undocumented, illegal alien workers, employed in the United States are entitled to the Act's protections. As noted by the Supreme Court, "[t]he Board has consistently held that undocumented aliens are "employees" within the meaning of Section 2(3) of the Act." 116 LRRM at 2860. The Court agreed with the Board's conclusion that, since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of "employee." As the Court noted in *Sure Tan*, "extending the coverage of the Act to such workers is consistent with the Act's avowed purpose of encouraging and protecting the collective-bargaining process." The Court's reasoning is worth noting because it is also applicable to the instant case:

> "[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.[37] (citation below) If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers,

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CNMI's regulation of immigration and the Act, I see no reason to decline to apply the Act at this time.

[37] *Sure Tan*, 116 LRRM 2861, quoting *De Canas v. Bica*, 424 U.S. 351, 356-357, 91 LRRM 2433 (1976).

> thereby eroding the unity of all the employees and impeding effective collective-bargaining."[38]

There is no reason not to apply the holding and the reasoning in *Sure Tan* to the nonresident workers in the CNMI. In *Sure Tan,* the Court found persuasive the Board's argument that enforcement of the Act with respect to undocumented alien employees is compatible with the policies of the Immigration and Naturalization Act. One of the INS' primary purposes in restricting immigration is to preserve jobs for American workers; thus, immigrant aliens are admitted to work in the United States only if they "will not adversely affect the wages and working conditions of the workers in the United States similarly employed." 8 U.S.C. Sec. 1182(a)(14). The Court went on to find that application of the Act helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. The Court aptly recognized that "[i]f an employer realizes that there will be no advantage under the Act in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened."[39]

Similarly, the purpose and policy of the NWA is that residents be given preference in employment and that "any necessary employment of nonresident workers in the Commonwealth not impair the wages and working conditions of resident workers." The CNMI Legislature

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[38] *Sure Tan,* 116 LRRM 2861, citing *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 33, 1 LRRM 703 (1937).

[39] *Sure Tan,* 116 LRRM at 2861.

also stated in the NWA that "the employment of nonresident workers should be temporary and generally limited to the duration of the specific job or employment for which the alien was recruited." 3 CMC § 4411(a).

By providing the nonresident workers with the same rights as the resident workers to participate in union activities, this assures that there will not be created a "subclass of workers without a comparable stake in the collective goals" of the resident co-workers, thereby protecting the terms and conditions of employment of the resident workers. Thus, I find that the same purpose and principles for applying the Act to illegal aliens in *Sure Tan* are also applicable in the instant case. I also note that the CNMI has enacted legislation protecting the rights of employees to bargain collectively regarding their wages[40]. This legislation covers all employees, and does not exclude nonresident workers.[41]

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[40] The following provision is contained in the CNMI's Minimum Wage and Hour Act, 4 CMC Sec. 9211 et seq:

> Nothing in this chapter shall be deemed to interfere with, impede or in any way diminish the right of employees to bargain collectively through representatives of their own choosing in order to establish wages in excess of the applicable minimum under this chapter or to establish hours of work shorter than the applicable maximum under this chapter. 4 CMC Sec. 9237.

[41] "Employee" is defined as any individual employed by an employer. 4 CMC Sec. 9212(e). Because the provision guaranteeing employees the right to bargain collectively is contained in the Minimum Wage and Hour Act, which covers nonresident workers, it is reasonable to conclude that it was the intent of the CNMI legislature to extend the bargaining provision to nonresident workers.

Application of the Principles Contained in *Res-Care/Long Stretch:*

Notwithstanding the indication that Congress generally intended to grant all aliens the protection contained in the Act, I now turn to the issue of whether, applying the principles set forth in the Board's *Res-Care/Long Stretch* line of cases,[42] I should reach a different conclusion. As explained below, I find that the Nonresident Workers Act and/or its implementing regulations do not restrict the Employer's ability to engage in "effective" or "meaningful" bargaining with a labor organization.

In *Res-Care*, the Board held that the employer, who operated a job corp center pursuant to a contract with the United States Department of Labor (DOL), did not have

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[42] While there are no cases directly on point, I find that the Board's reasoning and holding in its *Res-Care* and *Long Stretch* cases are analogous, and thus should be applied to the instant case. In these cases, the Board analyzed whether a private employer which has a contract to perform services for a governmental entity which is exempt from Board jurisdiction under Section 2(2) of the Act should share the governmental entity's exemption. In *Res Care*, the Board concluded that it would not exert jurisdiction over the private employer in such instances where the scope and degree of control exercised by the exempt entity over the employer's labor relations and the terms and conditions of employment of its employees do not permit an employer to exercise sufficient control over the employment conditions of its employees to enable it to engage in meaningful collective bargaining with a labor organization. Similarly, in the instant case, even though the Employer does not have a contract to perform any services for the CNMI government, it argues that the CNMI's regulatory scheme over immigration prevents it from engaging in meaningful bargaining with the Union over the terms and conditions of employment of its nonresident workers.

sufficient discretion in setting wages and benefits to engage in meaningful bargaining with a labor organization. In *Res-Care,* the Board reaffirmed the basic *National Transportation* test[43] and identified the evidentiary factors which are most significant in deciding whether a private employer has sufficient control over its employees' employment conditions to warrant the assertion of jurisdiction. The Board emphasized the importance of examining not only the control retained by the private employer but also the "scope and degree of control exercised by the exempt entity over the employer's labor relations. . . . " 280 NLRB at 672. The Board held as follows:

> When an employer like Res-Care lacks the ultimate authority to determine primary terms and conditions of employment, such as wage and benefit levels, it lacks the ability to engage in the necessary "give and take" which is a central requirement of good-faith bargaining, and which makes bargaining meaningful. (footnote omitted)

In that case, DOL, which provided 10 percent of Res-Care's funding, approved minimum-maximum wage ranges, as well as specific levels of various employee benefits. The employer could not set initial wages or

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[43] In *National Transportation Service,* 240 NRLB 565 (1979), the Board articulated a new standard for determining whether to assert its jurisdiction over a private employing entity providing services to or for an exempt governmental entity. The Board determined that if the private entity is itself an employer within the meaning of Section 2(2) of the Act, then the Board should assert jurisdiction if this employer "has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." *Ibid.*

grant a wage increase higher than the approved maximum, and could not provide greater benefits than those contained in the approved benefit package. The exempt entity thus exercised ultimate discretion over basic economic terms. DOL's total cost of the contract, embodied in the contract price, included the wage levels proposed by the employer and approved in advance by the exempt entity. Any attempt by Res-Care to pay wages or benefits above the approved maximums would result in a determination of "disallowable cost," and a reduction of Res-Care's payment under the contract.

By contrast, in *Long Stretch,* which operated a residential facility for teenage boys wherein residents were referred from the State of Maryland Social Services Administration (MSSA) and from the Maryland Department of Juvenile Services, the Board found that Long Stretch retained sufficient control over the essential terms and conditions of its employees to engage in meaningful collective bargaining. In exercising jurisdiction, the Board found that MSSA did not exercise ultimate discretion over wage and benefit levels. Although Long Stretch submitted for agency approval, with its initial license application, minimum-maximum salary ranges, as well as other personnel policies it might have, the agency did not maintain strict standards for the content of its policies, and Long Stretch largely determined what those salaries and other policies would be. While MSSA established minimum and maximum salary ranges as guidelines, suggesting a percentage limit of long Stretch's budget for salaries, and while there was testimony presented that the agency might initiate an investigation if an employer

were paying "grossly unfair" salaries, that phrase was not defined and was never applied.

The second distinction between the control over wages and benefits was that in *Long Stretch,* the wage and benefit levels approved by the agency were not directly tied to funding. In addition, the computation of the compensation received by Long Stretch from the State was not determined by the budget, as it was in *Res-Care.* While MSSA exercised some control over Long Stretch's hiring and firing, this was limited to the requirement that Long Stretch fill certain job classifications, and that employees meet certain minimum qualifications for these positions. The Board found that these minimal limitations on Long Stretch's authority to hire and fire employees did not significantly limit its ability to engage in meaningful bargaining. In so finding, the Board stated that the minimum employment conditions imposed by MSSA for child care workers were primarily designed to ensure that these employees remained able to provide the facility's residents with adequate supervision and care. The Board also noted that MSSA did not set the hours for child care workers, and only required that they have regularly scheduled hours and that they have at least one day off per week. The Board found that these minimal restrictions did not "disable Long Stretch from bargaining over terms and conditions of employment." 280 NLRB at 682. For the following reasons, I find that the instant case is unlike *Res-Care,* and more akin to *Long Stretch.*

Similar to *Long Stretch,* the evidence demonstrates that the Employer retain the ultimate authority to establish the terms and conditions of employment of its nonresident workers. It is clear that the overall purpose and

policy of the NWA and its implementing regulations are to manage the influx of foreign workers and to ensure that employers bear the responsibility of fulfilling the basic physical requirements of immigrant workers. In this regard, the NWA and other statutes provide for payment of certain minimum wage and fringe benefits to nonresident workers.[44]

The evidence establishes that the Employer has the authority to establish wage and benefit levels for its nonresident workers. While the Employer must not pay a wage higher than the wage contained in the job vacancy announcement, the Employer is free initially to establish whatever wage rate it wishes to pay for a particular job category.[45] Employers, however, may pay wages lower than the job vacancy announcement, assuming, of course, that the wages do not fall below the minimum wage rates required to be paid under CNMI law. Under the NWA, employers are also required to provide nonresident workers medical insurance or payment for all medical expenses, including certain other minimum expenses.

Neither the NWA nor its regulations establish any maximum wages and/or benefits which payments to nonresident workers may not exceed. It is obvious, from

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[44] See Minimum Wage and Hour Act, 4 CMC Sec. 9211, *et. seq.* Also see 3 CMC Sec. 4438(b), which requires employers to pay for physical examinations for nonresident workers.

[45] This, of course, is subject to the CNMI's Minimum Wage and Hour Act (MWHA). Under 2 CMC Sec. 9221, every employer must pay a certain minimum wage to employees, which presently is $2.75 per hour. Under the MWHA, employers are also required to pay one and one-half times the regular rate if an employee works in excess of 40 hours per week.

an examination of the CNMI's immigration law and the evidence presented, that the Labor Department is not concerned with the amount of wages or fringe benefits the Employer pays its nonresident workers, so long as certain minimum requirements are met.[46] In this respect, the instant case is similar to the facts presented in *Central Security Services*, 315 NLRB No. 34 (Sept. 30, 1994), slip op. at 2, in which the Board found that even though the wage determination mandated certain minimum fringe benefit levels for health and welfare, vacations, and number of holidays, "the Respondent was not prohibited from exceeding the minimum benefit levels or from providing additional types of benefits." *Id.* See also *U.S. Corrections Corp.*, 304 NLRB 934, 936 (1991) (where the employer retained the discretion to determine the level of wages).

A second significant distinction between the control over wages and benefits here, as compared to *Res-Care*, is that in this case (as in *Long-Stretch*), the wage and benefit levels approved in the nonresident workers' employment contract are not tied to this Employer's "funding" or source of revenue. As stated previously, the instant Employer simply does not have a contract with the CNMI

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[46] As stated previously, the Labor Department is also concerned that the wages and fringe benefits offered to prospective resident workers in the job vacancy announcement conform to the wage and benefit levels actually paid to the employee hired. These procedural requirements are imposed by the CNMI merely to ensure that there are no qualified resident workers available for the job vacancies, and they do not interfere with this Employer's ability to conduct meaningful bargaining with the Union.

government to perform services. Rather, this Employer is a private hotel, providing lodging and food to tourists. The Employer's annual revenue is not at all tied to the wage and compensation package contained in the employment contracts, which must be approved by the Labor Department. The CNMI government has little or no control over the setting of salaries, the content of the benefits provided, or the content of other personnel policies, so long as the Employer satisfies certain minimum standards and qualifications. Accordingly, this Employer retains substantial control over economic matters which are central to the employer-employee relationship.

Contrary to the Employer's contention, the law and regulations establishing procedures for hiring nonresident workers, including the NWA's preference for residents, do not interfere with the Employer's ability to conduct meaningful bargaining. As set forth in detail above, prior to hiring a nonresident worker, an employer must follow certain procedures, which include advising the Chief of Labor of certain vacancies and placing advertisements to determine whether a qualified resident worker is available to fill the positions. The purpose of these procedures is merely to ensure that resident workers are advised of job vacancies because under the CNMI's immigration law, an employer must hire an available qualified resident over a nonresident worker, even if, in the employer's opinion, the nonresident worker is more qualified.

The NWA's preference for hiring residents is not discriminatory[47] and does not conflict with an employer's bargaining obligation under the Act.[48] See *Career Systems Development Corp.*, 301 NLRB 434, 435 (1991) (where the Board asserted jurisdiction over an employer who had a contract with the Pennsylvania Department of Public Welfare, which provided that the employer must make a good-faith effort to fill 25% of its vacancies with applicants referred by local public assistance agencies).

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[47] The Employer's argument that the NWA's preferential treatment of resident workers constitutes discrimination on the basis of national origin is disingenuous. The local resident preference is apparently based on the fact that the residents are U.S. citizens, and the residents are comprised of Chamorro, Carolinian, Pacific Islanders, Caucasians, and presumably U.S. citizens of other races or national origins as well.

[48] Several states require that local residents must be hired preferentially for public employment or for private contractors who have contracted for public contracts. The State of Alaska enacted provisions requiring that nonresidents may be hired only if an employer establishes that residents are unavailable for employment on public contracts, and that an employer must establish a good faith effort to hire local residents in performance of contracts in areas impacted by economic disaster, prior to issuance of a certificate to hire a non-resident. See Alaska Statutes Sec. 36.10.070 and Sec. 44.33.290, respectively. The State of California mandates a preference for hiring qualified local workers for construction and operation of superconducting super collider project. See California Government Code Sec. 8790.10. The State of Nevada legislated a preference for local residents in public employment. See Nevada Revised Statutes Sec. 284.253. Montana enacted a preference for hiring handicapped persons in public employment, and a preference for hiring veterans for public employment. See Montana Code Annotated Secs. 39.30.206 and Sec. 39.29.104, respectively.

Moreover, the evidence establishes that this Employer generally exercises complete discretion in deciding whether to hire a contract worker over a local resident[49]. The Employer presented testimony that it may reject a resident's application and hire a nonresident if it determines that the resident is not qualified for the position. While the Employer must justify its decision not to hire a resident worker in a Statement of Compliance, which it must submit to Labor, the Employer's witness testified that, during his employment, Labor had never rejected a Statement of Compliance. With one exception, this Employer also presented testimony that Labor always approved its applications to renew a nonresident worker's contract.[50] The Joint Petitioners presented evidence establishing that Labor has, on occasion, rejected an employer's Statement of Compliance, wherein the employer had rejected a resident's application for employment. In those situations, however, the employer may withdraw the job announcement, wait for a period of

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[49] Even though the Employer strenuously argues that the CNMI's preference for hiring of residents interferes with its ability to bargain with the Union, it is apparent from the evidence that residents rarely apply for the Employer's job vacancies, in view of the proportion of nonresidents to residents working at Employer's establishment, and further, in view of the total proportion of nonresidents to residents working in the CNMI. *Supra* at page 4.

[50] The sole exception raised by the Employer was Labor's failure to renew the employment contract of Vicente Perez, a discriminatee in an unfair labor practice case pending before the Region in Case 37-CA-3978. The CNMI's Labor Department refused to renew Perez' employment contract, since a resident worker applied for Perez' storekeeper position.

time, and then readvertise the position at a later date, at which time perhaps no residents will apply for the position.

With the exception of the resident preference requirement, the evidence establishes that the Employer is free to hire the applicant of its choice. The Employer presented testimony that it has a recruiting agency, Paras Enterprises, in the Republic of the Philippines, which screens nonresident applicants for employment. After the initial screening is completed, prospective applicants are interviewed by the Employer's management, which then makes the final selections. No evidence was presented that the Labor Department had to interview and approve these nonresident workers before they could be employed by the Employer. In reviewing applications for employment of nonresident workers, the Labor Department merely reviews the documents[51] to ensure that the nonresident worker satisfies the minimum qualifications of the job category, including the requirement of two years' experience, and that certain procedural requirements are met, including the presentation of a health certification and a satisfactory physical examination.

The instant case is similar to the facts presented in *U.S. Corrections Corp., supra* at 937, in which the Board exercised jurisdiction over an employer, where the "[s]tate's monitoring of compliance with the statute and contract is limited to whether the Employer's personnel actions are in compliance with the contract and do not

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[51] The documents include the Nonresident Workers Affidavit and the Employment Contract.

amount to independent assessments of the personnel actions." In *U.S. Corrections Corp.*, the State reviewed new hires to make sure that the employees passed background security checks and met minimal qualifications. *Id.* The Board found that there was "no evidence that they were reviewed as to whether the Employer made the best choice among candidates." (footnote omitted) *Id.* Also see *Central Security Services, supra,* slip op. at 4 (wherein the Board asserted jurisdiction over an employer which had to forward applicants to the United States Marshals Service (USMS) for security checks, and where the USMS could disapprove the hiring of an applicant as a court security officer under its contract with USMS).

The Employer also appears to argue that Labor's requirement that the Employer's listing of a job vacancy must be in accordance with the Dictionary of Occupational Title (DOT) and Guide to Occupational Exploration (GOE) unduly restricts the Employer's ability to establish job categories and classifications, thereby restricting its ability to choose an appropriate candidate for a position. I must again disagree with the Employer's position. These requirements are similar to the requirements imposed by the MSSA over Long Stretch, in which the Board exercised jurisdiction. [In *Long Stretch,* the MSSA regulations required Long Stretch to establish certain staff positions, in sufficient numbers to serve the children at the facility. The MSSA regulations also imposed minimum qualifications for certain staff as well as some minimum employment conditions (child care workers were required to be at least 21 years of age and have a high school diploma) 280 NLRB at 679].

While the CNMI's Labor Department has to approve the individual employment contracts entered into with nonresident workers, the evidence demonstrates that the CNMI's authority has largely been exercised in a general oversight manner.[52] Labor's review is limited to reviewing the documents to ensure that all of the procedural requirements are met, that the necessary documents are received and are filled out properly, and that the occupational qualifications and experience are reasonable for the job position. The testimony establishes that the "reviewers" at the Labor Department routinely approve these contracts, in a series of ministerial, almost perfunctory acts. If employment contracts are rejected, the rejection is generally based on a technical deficiency, which is easily remedied by the Employer. The record further evidences that both initial and renewal contracts are routinely and regularly approved by Labor, with no hiatus in a nonresident worker's employment. The Employer was unable to provide any examples in which Labor disapproved an initial employment contract it had submitted.

I also find that the CNMI's requirements that employment contracts must be renewed annually, and that any changes to the employment contract during its

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[52] See *U.S. Corrections Corp.*, 304 NLRB at 936-37, where the Board stated, in asserting jurisdiction over the employer, that the States authority to approve all of the employer's policies and procedures has been exercised in a general oversight manner. The Board noted that the State's monitoring of compliance with the Statute and contract is limited to whether the Employer's personnel actions are in compliance with the contract, and are not independent assessments of the personnel actions.

term must be approved by Labor, do not restrict the Employer's ability to engage in meaningful bargaining. First of all, the evidence shows that Labor's approval of applications to renew a nonresident's employment contract is routine and generally granted. In fact, the Employer could only point to one instance where a renewal request was denied, and that denial was based on the fact that apparently a qualified resident worker was available to fill the position. While the Employer asserts that it must readvertise the job position prior to seeking renewal of an employment contract, assuming that the job classification of the nonresident worker has not changed, the NWA, its implementing regulations, and the Application for Renewal form itself do not contain any such requirement.[53] If, however, readvertisement is for some reason required under CNMI law, I find that the application of such requirement is merely procedural and does not preclude assertion of jurisdiction in this case.[54]

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[53] See fn. 26, supra.

[54] See *Central Security Services*, 315 NLRB No. 34, slip op. at 4. It appears that the purpose of readvertisement, if required, is to determine whether any residents currently desire to apply for the nonresident worker's position. Presumably, assuming that the wage rate paid for the job classification might have increased, perhaps a resident may apply for the job. It is apparent from the record, however, that most of the nonresident workers have been employed by this Employer anywhere from two to six years, and some nonresidents have been employed as long as 10 years. In view of the obvious lack of sufficient numbers of residents to occupy available positions in Saipan, however, it appears that the nonresidents, in fact, comprise a "permanent," rather than a "temporary," workforce.

I also note that, unlike the CNMI's immigration law and regulations, the regulations governing immigration in the

Moreover, the Employer is required to renew the nonresident workers' employment contracts annually, regardless of whether it is obligated to bargain with the Union. I do not see this procedural requirement as an impediment to bargaining. As stated previously, in reviewing applications for renewal, the Labor Department's mission is to ensure that the Employer fulfills the procedural requirements of the NWA and its regulations. Under the CNMI law, the purpose of requiring approval of renewal applications is apparently to "keep track" of the nonresidents by ensuring that they still have employment, and to reaffirm the application of certain procedural safeguards. Thus, when Labor examines the renewal application, it is doing so solely to determine whether certain minimum requirements have been met.[55]

United States ensure that the wages paid by employers to temporary workers are in conformance with the prevailing wage rates paid for particular job classifications. See 20 CFR Sec. 655.3(b); Sec. 655.102(a) (employers must provide at least the same level of minimum benefits, wages and working conditions which must be offered to U.S. workers).

[55] The NWA does not have a specific section governing applications for renewal of employment contracts. The Alien Labor Rules and Regulations provide under Sec. II, as follows:

C. Renewal of Labor Certificates.

1. Procedures and Requirement

a. Payment of application fee

b. DOL Form 88-007 (Application for Renewal of Labor Identification Certificate) and including supporting documents or exhibits.

c. Labor Identification Certificate (work permit) and Entry Permit

Neither the NWA nor the regulations, either directly or otherwise, establish any maximum wages or benefits, and/or discuss or infer a prohibition against granting additional benefits to the nonresident workers.[56]

Thus, there would be no reason why the Labor Department would not routinely renew an employment contract which contained higher wages or benefits. In submitting a nonresident worker's initial application for employment or a renewal application, the Employer can simply attach a copy of any applicable collective bargaining agreement it might reach with the Union. It is clear that, under the CNMI's immigration law and corresponding regulations, the Labor Department would review the bargaining agreement merely to ensure that the minimal statutory and regulatory requirements were met. This approval process does not constitute the type of control necessary to establish that this Employer has relinquished the authority to determine the nonresident workers' wages and other terms of employment. *See R.W. Harmon & Sons,* 297 NLRB 562, 563 (1990) [where the Board asserted jurisdiction over the Employer, wherein the Employer's contract with the school district did not

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[56] Of course, any contractual provisions negotiated by the Union must be in conformance with any applicable laws and regulations. It appears from a review of the evidence that most of the bargaining unit employees are currently being paid about the minimum wage required by the CNMI's Minimum Wage and Hour Law, and presumably, any wages negotiated by the Union would fall above that level.

expressly require approval of every term of the agreement, distinguishing *Ohio Inns*, 205 NLRB 528 (1973)].[57]

The same reasoning applies to any application for approval of changes in the employment contract which must be submitted to Labor. Assuming that the Employer satisfies the procedural requirements contained in the law, the record evidences that the Labor Department would, *pro forma*, approve any such changes. I also see no impediment in the CNMI law governing immigration which would restrict an employer from requesting changes in the employment contract prior to its expiration.[58] Contrary to the Employer's contention, while

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[57] While finding it unnecessary to address this issue, I note that, if the CNMI's immigration law and regulations imposed any requirement beyond that necessary to insure that minimal statutory and regulatory requirements were met, such requirement would conflict with the purpose and policies contained in the Act, because it would unduly infringe on the employees' right to bargain. Because such requirement would appear to exceed the exercise of the CNMI's immigration authority, it would thus be preempted by the Act. See *A & E Pacific Const. Co. v. Saipan Stevedore Co.*, 888 F.2d at 70; cf. *Yang v. American International Knitters Corp.*, 789 F. Supp. 1074 (D.C. N. Mariana Islands 1992) (wherein the District Court found that portions of the NWA violated equal protection).

[58] The NWA provides that "[a]ny nonresident employment contract or change thereto which has not been approved by the Chief or which violates any provisions of this chapter shall, in the discretion of the Chief: (1) Be voidable; (2) Be grounds for certificate revocation; (3) Be grounds to disqualify an employer from further use of any nonresident labor." 3 CMC Sec. 4437 (d). It is obvious that the statute's purpose in requiring that Labor must approve any changes to the contract is to ensure that the nonresident workers are protected against having their wages or fringe benefits reduced. Thus, if the Union were to negotiate,

effectuating a "promotion" may mean that the Employer will have to submit a new employment contract to Labor for approval (presumably a promotion may change an employee's job classification), the record does not contain any evidence that such approval, similar to initial applications, would not be routinely granted.

The Employer also argues that terminating a nonresident "is also burdensome in the CNMI," in that the grounds for termination of a nonresident must be listed in the employment contract and a nonresident's employment contract can only be terminated for cause[59]. While the CNMI law is somewhat unclear with respect to whether it places such a termination restriction on the Employer, I find that any such procedural impediment to termination does not preclude the Board's assertion of jurisdiction, since the Board has held that a governmental entity's possession of authority to request a contractor to dismiss an employee did not preclude the Board's assertion of jurisdiction. See *Central Security Services, supra,* slip op. at 4, citing *FKW, Inc.,* 308 NLRB 598 (1992); *Old*

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for example, higher wage rates for the nonresident workers, the Employer could apply to Labor for approval of those changes prior to the expiration of the individual worker's employment contract.

[59] In support of its argument that the Employer may only terminate nonresidents for cause, the Employer cites 3 CMC Sec. 4447(f), which provides in pertinent part: "Similarly, an employer shall not file suit to terminate its employment contract with a nonresident worker unless an unsuccessful good faith attempt has been made to settle any dispute the employer has with the nonresident worker."

Dominion Security, 289 NLRB 81, 83 (1988); *Dynaelectron Corp.* 286 NLRB 302, 305 (1987).

In addition, the CNMI immigration law establishes that the Labor Department may conduct investigations of worksites where nonresident workers are employed, including any employer-provided residential facility, for the purpose of inspecting such sites to determine whether there have been any violations of the NWA. See 3 CMC Sec. 4441, 4442, 4444. The immigration law also provides that the employer must maintain, and submit to the Chief of Labor, if requested, records concerning the nonresident workers, including the number of employment-related accidents and illnesses of these workers. 3 CMC Sec. 4439. These merely constitute oversight functions to ensure that the Employer is in compliance with the statute and to ensure that the nonresident workers' health and safety is not in jeopardy, and do not interfere with the Employer's ability to conduct effective bargaining with the Union.[60] See *Long Stretch,* 280 NLRB at 680 (where the MSSA inspected Long Stretch's facilities twice a year and examined the Employer's records, including personnel files).

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[60] I also note that this Employer is required to comply with Federal regulatory requirements, including compliance with the requirements of the Occupational Safety and Health Act (OSHA) and the provisions of the Fair Labor Standard Act (FLSA) (except for the minimum wage and hour provisions). The regulatory requirements over recordkeeping and facilities inspection are similar to the regulatory requirements imposed by Federal statutes and regulation, and the Board has never held that compliance with these regulatory statutes constitutes an impediment to collective bargaining.

Contrary to the Employer's contention, the fact that the NWA establishes a "grievance" procedure,[61] whereby nonresident workers may file complaints against their employer, does not conflict with the Act. The Employer's argument is disingenuous, in view of the fact that employees generally have more than one avenue in which to pursue complaints.[62] This in no way interferes with the Employer's ability to conduct meaningful bargaining with the Union.

The Employer also argues that I should decline to assert jurisdiction because, in the event of a strike, given the composition of the work force in the CNMI, a balance of economic strength could not be achieved. In response to the Employer's assertions that it could not stop paying the striking nonresidents without Labor's approval and that it would still remain responsible for the payment of medical expenses for the striking nonresidents as long as they remained in the CNMI, I note that these payments are waivable by Labor. With respect to the Employer's argument that it "could not obtain replacements [for the strikers] without going through the entire hiring process under the NWA," this is certainly not a persuasive reason for the Board to decline to assert jurisdiction. Indeed, there are many employers in the United States who might

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[61] I also note that the Labor Department has not held a hearing on any complaints filed against this Employer during the past 1½ years.

[62] Employees covered under the Act may, of course, pursue simultaneous remedies by filing a grievance under provisions of a collective bargaining agreement and by filing an unfair labor practice under the Act, and the Board may defer the dispute to the parties' grievance/arbitration procedure.

have difficulty finding replacements during a strike to fill certain occupational categories. The Employer here is free to hire resident workers and nonresident "aliens" as replacements, whereas in the United States, the U.S. Department of Labor regulations prohibit the hiring of temporary alien workers by employers to replace striking employees. See 20 CFR Sec. 655.3(b) and Sec. 652.9(a).

I cannot deny an entire class of nonresident workers, who constitute "employees" under the Act, their right to organize on the basis of speculative "uncertainties" posited by the Employer with respect to the consequences of a possible strike.

In asserting jurisdiction, I am also cognizant of the fact that refusal to assert jurisdiction over the Employer because of the CNMI's regulatory scheme governing nonresident workers may result in an untenable situation wherein only 1/3 of this Employer's workforce would be covered by the Act. Many of the Employer's "resident" employees work side by side with the nonresident workers in identical job positions, performing the same job duties. This circumstance may result in disenfranchising the resident workers.[63]

Moreover, I also note that the CNMI's regulation of immigration through the NWA legislation and its implementing regulations is similar to the regulation of temporary workers in the United States by the Immigration and

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[63] I note that it may be unlikely that any labor organization would seek to represent the class of resident workers working for this Employer, since many of these residents work side by side with the nonresident workers and share the same terms and conditions of employment, as discussed *infra*.

Naturalization Service (INS).[64] In fact, the Immigration and Naturalization Act (INA) closely regulates the admission of temporary employees to the United States by requiring, *inter alia*, that the employer must advertise locally to fill the available positions, certify that there are no American workers available to fill those positions, and provide return airfare for the temporary workers. See 8 U.S.C. 101(a)(15)(h). Moreover, in order to secure temporary workers, an employer must provide specific documentation to the Department of Labor and to the INS.[65] Thus, because the immigration procedures established by

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[64] The visa classification system established by the INS for temporary workers is as follows: Registered nurses – H-1A; Specialty Occupations, Fashion models or services related to the Department of Defense – H-1B; Temporary or seasonal agricultural laborers – H-2A; Temporary non-agricultural laborers – H-2B; Trainee or exchange students – H-3. The regulations governing such employment are codified at 20 CFR 655 et seq. and 29 CFR 504 et seq. I also note that testimony was presented that the CNMI government reviewed the H-1 and H-2 provisions of the INA when preparing revisions of its immigration laws.

[65] For example, in order for an employer to secure approval to hire an H-1B nonimmigrant, the Labor Condition Application to the DOL must show that the employee will be paid equivalent to the prevailing wage in that classification, that employment of the alien will not adversely affect the working conditions of U.S. workers similarly employed, that there is no strike or lockout in effect, that the bargaining representative has been notified of the intent to hire an alien worker, or if there is no bargaining representative, that such notice has been posted at the place of employment. See 20 CFR Parts 652, 655; Austin Fragomen, Jr., Practicing Law Institute, Litigation and Administrative Practice Course Handbook Series, April-June 1994, *An Overview of the Immigration System.*

the INS, which are in many respects similar to those imposed by the CNMI, do not constitute an impediment to the assertion of jurisdiction over aliens in the United States,[66] I see no reason for the immigration requirements imposed by the CNMI to constitute such an impediment here.[67]

Based on the foregoing, I find that the Employer herein retains sufficient control over the essential terms

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[66] While there was apparently never an issue raised in *Sure-Tan* with respect to whether the regulatory scheme imposed by the INS would preclude the assertion of Board jurisdiction, the Supreme Court's affirmance of the Board's assertion of jurisdiction is consistent with the principles established in the *Res-Care/Long Stretch* line of cases.

[67] The Employer maintains that the CNMI immigration system cannot be compared to the INS system because, (1) unlike temporary workers employed in the United States, the nonresident workers are "*not* temporary," (emphasis supplied by Employer); (2) in the CNMI, unlike the United States, "temporary workers" outnumber resident workers by 2.5 to 1; (3) and the CNMI immigration system does not contain comparable protections to ensure that CNMI and nonresident workers are provided with the same benefits (presumably so that CNMI employers cannot undercut CNMI resident workers by hiring nonresident workers). While I agree with the Employer that "it is clear that the US and the CNMI do not deal with nonimmigrant workers in the same manner," in particular, because the CNMI does not ensure that the nonresident workers are paid according to the "prevailing wage rate" in the CNMI economy, this difference, if anything, provides additional justification for the board's assertion of jurisdiction. An examination of the evidence has led me to conclude that declining to apply the Act to the nonresident workers here would perpetuate "a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers." *Sure Tan*, 116 LRRM at 2861.

and conditions of employment of its nonresident workers to enable it to engage in meaningful collective bargaining with a labor organization. Accordingly, I conclude that it will effectuate the purposes and policies of the Act to apply the provisions of the Act to the Employer's nonresident contract workers in this case.

The Nonresident and Resident Employees Comprise an Appropriate Bargaining Unit:

The Employer contends that a unit including the resident and nonresident employees is not appropriate because the two groups of employees do not share the same "community of interest." The Employer argues that it maintains separate personnel systems for residents and nonresidents, and while there are some similar conditions of employment, "the manner in which labor policy, terms and conditions of employment are set for the two groups is different." Moreover, the Employer asserts that the NWA, which establishes a preference for residents over nonresidents, creates an inherent conflict between the two groups.

In determining whether a petitioned-for unit of employees constitutes "an appropriate unit,"[68] the Board assesses a number of factors in order to determine whether the unit employees possess a community of interest. Such factors include (1) differences or similarities in wages, compensation and benefits; (2) common

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[68] Board inquiry pursues not the most appropriate or comprehensive unit but simply an appropriate unit. Once this unit is determined, the requirements of the Act are satisfied. The inquiry first considers the petitioning union's proposals. *See P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988).

supervision; (3) hours of work; (4) qualifications, training and job skills; (5) job functions; (6) frequency of contact with other employees; (7) functional integration and interchange with other employees; and (8) bargaining history. *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962).

The record establishes that the resident and nonresident employees work side by side in the same geographical work locations, share common supervision, similar hours of work and shifts. The majority of employees are full-time; and there are only two part-time employees, who are residents. Both the resident and nonresident employees are hired, trained and supervised by the same department heads. Resident and nonresident employees also work in the same job classifications, with essentially the same or similar job duties and assignments, and receive monthly evaluations. These two groups of employees also receive the same or similar wage rates, including bonuses, annual pay increases and overtime.

The Employer maintains a single personnel office and staff, which administers personnel policy for both resident and nonresident employees. CNMI tax laws and workers' compensation laws apply to both residents and nonresidents. The Employer considers the same factors in terminating resident and nonresident employees.

While the Employer maintains different health insurance policies, and provides certain additional benefits for the nonresident employees as compared to its resident employees because of the requirements contained in the

NWA,[69] I do not find these factors sufficient to outweigh the overwhelming evidence set forth above which demonstrates the community of interest existing between the resident and nonresident employees. I therefore find that the resident and nonresident employees of the Employer are appropriately included in the same bargaining unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit described above at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to

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[69] I also take administrative notice that, subsequent to the hearing in this case, legislation (H.B. 9-360) was enacted by the CNMI legislature which provides that "all benefits mandated by law given to non-resident workers, including, but not limited to food, housing, transportation, health insurance, and medical expenses, must also be provided to resident workers or in a cash equivalent in jobs where the standard hourly wage is less than $4.25, or the prevailing United States Federal minimum wage standard, whichever is higher."

vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Commonwealth Labor Federation and the Hotel Employees and Restaurant Employees, Local 5, AFL-CIO, Joint Petitioners.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Officer In Charge of the Subregion who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (Oct. 26, 1994). In order to be timely filed, such list must be received in the Subregion 37 Office, 300 Ala Moana Boulevard, Room 7318, Post Office Box 50208, Honolulu, Hawaii 96850, on or before *March 30, 1995*. No extension of time to file this list shall

be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by *April 6, 1995.*

Dated at San Francisco, California, this *23rd* day of *March,* 1995.

/s/ Robert H. Miller
Robert H. Miller,
Regional Director
National Labor Relations
Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAIPAN HOTEL CORP., d.b.a. Hafadai Beach Hotel, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent, HOTEL EMPLOYEES & RESTAURANT EMPLOYEES LOCAL 5, Respondent-Intervenor.	)	No. 96-70076 **ORDER** (Filed Jul. 28, 1997)
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. SAIPAN HOTEL CORP., d.b.a. Hafadai Beach Hotel, Respondent.	)	No. 96-70198

BEFORE: NORRIS, HALL, and TASHIMA, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Hall and Tashima have voted to reject the suggestion for a rehearing en banc, and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en banc is **REJECTED**.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAIPAN HOTEL CORP. d.b.a. Hafadai Beach Hotel, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	No. 96-70403 **ORDER** (Filed Jul. 28, 1997)
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. SAIPAN HOTEL CORP., d.b.a. Hafadai Beach Hotel, Respondent.	)	No. 96-70483

Before: NORRIS, HALL, and TASHIMA, Circuit Judges:

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Hall and Tashima have voted to reject the suggestion for a rehearing en banc, and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

PUBLIC LAW 94-241 [H.J.Res. 549]; March 24, 1976

COMMONWEALTH – COVENANT TO ESTABLISH – NORTHERN MARIANA ISLANDS

For Legislative History of Act, see p. 448

Joint Resolution to approve the "Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America", and for other purposes.

Whereas the United States is the administering authority of the Trust Territory of the Pacific Islands under the terms of the trusteeship agreement for the former Japanese-mandated islands entered into by the United States with the Security Council of the United Nations on April 2, 1947, and approved by the United States on July 18, 1947; and

Whereas the United States, in accordance with the trusteeship agreement and the Charter of the United Nations, has assumed the obligation to promote the development of the peoples of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned; and

Whereas the United States, in response to the desires of the people of the Northern Mariana Islands clearly expressed over the past twenty years through public petition and referendum, and in response to its own obligations under the

trusteeship agreement to promote self-determination, entered into political status negotiations with representatives of the people of the Northern Mariana Islands; and

Whereas, on February 15, 1975, a "Covenant to Establish A Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" was signed by the Marianas Political Status Commission for the people of the Northern Mariana Islands and by the President's Personal Representative, Ambassador F. Haydn Williams for the United States of America, following which the covenant was approved by the unanimous vote of the Mariana Islands District Legislature on February 20, 1975 and by 78.8 per centum of the people of the Northern Mariana Islands voting in a plebiscite held on June 17, 1975: Now be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, the text of which is as follows, is hereby approved.

"COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA

"Whereas, the Charter of the United Nations and the Trusteeship Agreement between the Security Council of the United Nations and the United States of America guarantee to the people of the Northern Mariana Islands the right freely to express their wishes for self-government or independence; and

"Whereas, the United States supports the desire of the people of the Northern Mariana Islands to exercise their inalienable right of self-determination; and

"Whereas, the people of the Northern Mariana Islands and the people of the United States share the goals and values found in the American system of government based upon the principles of government by the consent of the governed, individual freedom and democracy; and

"Whereas, for over twenty years, the people of the Northern Mariana Islands, through public petition and referendum, have clearly expressed their desire for political union with the United States;

"Now, therefore, the Marianas Political Status Commission, being the duly appointed representative of the people of the Northern Mariana Islands, and the Personal Representative of the President of the United States have entered into this Covenant in order to establish a self-governing commonwealth for the Northern Mariana Islands within the American political system and to define the future relationship between the Northern Mariana Islands and the United States. This Covenant will be mutually binding when it is approved by the United States, by the Mariana Islands District Legislature and by the people of the Northern Mariana Islands in a plebiscite, constituting on their part a sovereign act of self-determination.

"ARTICLE I

"POLITICAL RELATIONSHIP

"SECTION 101. The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the 'Commonwealth of the Northern Mariana Islands', in political union with and under the sovereignty of the United States of America.

"SECTION 102. The relations between the Northern Mariana Islands and the United States will be governed by this Covenant which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.

"SECTION 103. The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption.

"SECTION 104. The United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands.

"SECTION 105. The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United

States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

"ARTICLE II

"CONSTITUTION OF THE NORTHERN MARIANA ISLANDS

"SECTION 201. The people of the Northern Mariana Islands will formulate and approve a Constitution and may amend their Constitution pursuant to the procedures provided therein.

"SECTION 202. The Constitution will be submitted to the Government of the United States for approval on the basis of its consistency with this Covenant and those provisions of the Constitution, treaties and laws of the United States to be applicable to the Northern Mariana Islands. The Constitution will be deemed to have been approved six months after its submission to the President on behalf of the Government of the United States unless earlier approved or disapproved. If disapproved the Constitution will be returned and will be resubmitted in accordance with this Section. Amendments to the Constitution may be made by the people of the Northern Mariana Islands without approval by the Government of the United States, but the courts established by the Constitution or laws of the United States will be competent to determine whether the Constitution and subsequent amendments thereto are consistent with this Covenant and with those provisions of the Constitution, treaties

and laws of the United States applicable to the Northern Mariana Islands.

"SECTION 203. (a) The Constitution will provide for a republican form of government with separate executive, legislative and judicial branches, and will contain a bill of rights.

"(b) The executive power of the Northern Mariana Islands will be vested in a popularly elected Governor and such other officials as the Constitution or laws of the Northern Mariana Islands may provide.

"(c) The legislative power of the Northern Mariana Islands will be vested in a popularly elected legislature and will extend to all rightful subjects of legislation. The Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicameral legislature, notwithstanding other provisions of this Covenant or those provisions of the Constitution or laws of the United States applicable to the Northern Mariana Islands.

"(d) The judicial power of the Northern Mariana Islands will be vested in such courts as the Constitution or laws of the Northern Mariana Islands may provide. The Constitution or laws of the Northern Mariana Islands may vest in such courts jurisdiction over all causes in the Northern Mariana Islands over which any court established by the Constitution or laws of the United States does not have exclusive jurisdiction.

"SECTION 204. All members of the legislature of the Northern Mariana Islands and all officers and employees

of the Government of the Northern Mariana Islands will take an oath or affirmation to support this Covenant, those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, and the Constitution and laws of the Northern Mariana Islands.

"ARTICLE III

"CITIZENSHIP AND NATIONALITY

"SECTION 301. The following persons and their children under the age of 18 years on the effective date of this Section, who are not citizens or nationals of the United States under any other provision of law, and who on that date do not owe allegiance to any foreign state, are declared to be citizens of the United States, except as otherwise provided in Section 302:

"(a) all persons born in the Northern Mariana Islands who are citizens of the Trust Territory of the Pacific Islands on the day preceding the effective date of this Section, and who on that date are domiciled in the Northern Mariana Islands or in the United States or any territory or possession thereof;

"(b) all persons who are citizens of the Trust Territory of the Pacific Islands on the day preceding the effective date of this Section, who have been domiciled continuously in the Northern Mariana Islands for at least five years immediately prior to that date, and who, unless under age, registered to vote in elections for the Marianas Islands District Legislature or for any municipal election in the Northern Mariana Islands prior to January 1, 1975; and

"(c) all persons domiciled in the Northern Mariana Islands on the day preceding the effective date of this Section, who, although not citizens of the Trust Territory of the Pacific Islands, on that date have been domiciled continuously in the Northern Mariana Islands beginning prior to January 1, 1974.

"SECTION 302. Any person who becomes a citizen of the United States solely by virtue of the provisions of Section 301 may within six months after the effective date of that Section or within six months after reaching the age of 18 years, whichever date is the later, become a national but not a citizen of the United States by making a declaration under oath before any court established by the Constitution or laws of the United States or any court of record in the Commonwealth in the form as follows:

" 'I ——— being duly sworn, hereby declare my intention to be a national but not a citizen of the United States.' "

"SECTION 303. All persons born in the Commonwealth on or after the effective date of this Section and subject to the jurisdiction of the United States will be citizens of the United States at birth.

"SECTION 304. Citizens of the Northern Mariana Islands will be entitled to all privileges and immunities of citizens in the several States of the United States.

"ARTICLE IV

"JUDICIAL AUTHORITY

"SECTION 401. The United States will establish for and within the Northern Mariana Islands a court of

record to be known as the 'District Court for the Northern Mariana Islands'. The Northern Mariana Islands will constitute a part of the same judicial circuit of the United States as Guam.

"SECTION 402. (a) The District Court for the Northern Mariana Islands will have the jurisdiction of a district court of the United States, except that in all causes arising under the Constitution, treaties or laws of the United States it will have jurisdiction regardless of the sum or value of the matter in controversy.

"(b) The District Court will have original jurisdiction in all causes in the Northern Mariana Islands not described in Subsection (a) jurisdiction over which is not vested by the Constitution or laws of the Northern Mariana Islands in a court or courts of the Northern Mariana Islands. In causes brought in the District Court solely on the basis of this subsection, the District Court will be considered a court of the Northern Mariana Islands for the purposes of determining the requirements of indictment by grand jury or trial by jury.

"(c) The District Court will have such appellate jurisdiction as the Constitution or laws of the Northern Mariana Islands may provide. When it sits as an appellate court, the District Court will consist of three judges, at least one of whom will be a judge of a court of record of the Northern Mariana Islands.

"SECTION 403. (a) The relations between the courts established by the Constitution or laws of the United States and the courts of the Northern Mariana Islands with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus and other matters or

proceedings will be governed by the laws of the United States pertaining to the relations between the courts of the United States and the courts of the several States in such matters and proceedings, except as otherwise provided in this Article; provided that for the first fifteen years following the establishment of an appellate court of the Northern Mariana Islands the United States Court of Appeals for the judicial circuit which includes the Northern Mariana Islands will have jurisdiction of appeals from all final decisions of the highest court of the Northern Mariana Islands from which a decision could be had in all cases involving the Constitution, treaties or laws of the United States, or any authority exercised thereunder, unless those cases are reviewable in the District Court for the Northern Mariana Islands pursuant to Subsection 402(c).

"(b) Those portions of Title 28 of the United States Code which apply to Guam or the District Court of Guam will be applicable to the Northern Mariana Islands or the District Court for the Northern Mariana Islands, respectively, except as otherwise provided in this Article.

"ARTICLE V

"APPLICABILITY OF LAWS

"SECTION 501. (a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3, and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2,

Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15; Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with approval of the Government of the Northern Mariana Islands and of the Government of the United States.

"(b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Sections 203, 506 and 805 and the proviso in Subsection (a) of this Section.

"Section 502. (a) The following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:

> "(1) those laws which provide federal services and financial assistance programs and the federal banking laws as they apply to Guam; Section 228 of Title II and Title XVI of the Social Security Act as it applies to the several States; the Public Health Service Act as it applies to the Virgin Islands; and the Micronesian Claims Act as it applies to the Trust Territory of the Pacific Islands;

"(2) those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States; and

"(3) those laws not described in paragraph (1) or (2) which are applicable to the Trust Territory of the Pacific Islands, but not their subsequent amendments unless specifically made applicable to the Northern Mariana Islands, as they apply to the Trust Territory of the Pacific Islands until termination of the Trusteeship Agreement, and will thereafter be inapplicable.

"(b) The laws of the United States regarding coastal shipments and the conditions of employment, including the wages and hours of employees, will apply to the activities of the United States Government and its contractors in the Northern Mariana Islands.

"SECTION 503. The following laws of the United States, presently inapplicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement:

"(a) except as otherwise provided in Section 506; the immigration and naturalization laws of the United States;

"(b) except as otherwise provided in Subsection (b) of Section 502, the coastwise laws of the United States and any prohibition in the laws of the United States against foreign vessels landing fish or unfinished fish products in the United States; and

"(c) the minimum wage provisions of Section 6, Act of June 25, 1938, 52 Stat. 1062, as amended.

"SECTION 504. The President will appoint a Commission on Federal Laws to survey the laws of the United States and to make recommendations to the United States Congress as to which laws of the United States not applicable to the Northern Mariana Islands should be made applicable and to what extent and in what manner, and which applicable laws should be made inapplicable and to what extent and in what manner. The Commission will consist of seven persons (at least four of whom will be citizens of the Trust Territory of the Pacific Islands who are and have been for at least five years domiciled continuously in the Northern Mariana Islands at the time of their appointments) who will be representative of the federal, local, private and public interests in the applicability of laws of the United States to the Northern Mariana Islands. The Commission will make its final report and recommendations to the Congress within one year after the termination of the Trusteeship Agreement, and before that time will make such interim reports and recommendations to the Congress as it considers appropriate to facilitate the transition of the Northern Mariana Islands to its new political status. In formulating its recommendations the Commission will take into consideration the potential effect of each law on local conditions within the Northern Mariana Islands, the policies embodied in the law and the provisions and purposes of this Covenant. The United States will bear the cost of the work of the Commission.

"SECTION 505. The laws of the Trust Territory of the Pacific Islands, of the Mariana Islands District and its local municipalities, and all other Executive and District

orders of a local nature applicable to the Northern Mariana Islands on the effective date of this Section and not inconsistent with this Covenant or with those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands will remain in force and effect until and unless altered by the Government of the Northern Mariana Islands.

"SECTION 506. (a) Notwithstanding the provisions of Subsection 503(a), upon the effective date of this Section the Northern Mariana Islands will be deemed to be a part of the United States under the Immigration and Nationality Act, as amended for the following purposes only, and the said Act will apply to the Northern Mariana Islands to the extent indicated in each of the following Subsections of this Section.

"(b) With respect to children born abroad to United States citizen or non-citizen national parents permanently residing in the Northern Mariana Islands the provisions of Sections 301 and 308 of the said Act will apply.

"(c) With respect to aliens who are 'immediate relatives' (as defined in Subsection 201(b) of the said Act) of United States citizens who are permanently residing in the Northern Mariana Islands all the provisions of the said Act will apply, commencing when a claim is made to entitlement to 'immediate relative' status. A person who is certified by the Government of the Northern Mariana Islands both to have been a lawful permanent resident of the Northern Mariana Islands and to have had the 'immediate relative' relationship denoted herein on the effective date of this Section will be presumed to have been admitted to the United States for lawful permanent residence

as of that date without the requirement of any of the usual procedures set forth in the said Act. For the purpose of the requirements of judicial naturalization, the Northern Mariana Islands will be deemed to constitute a State as defined in Subsection 101(a) paragraph (36) of the said Act. The Courts of record of the Northern Mariana Islands and the District Court for the Northern Mariana Islands will be included among the courts specified in Subsection 310(a) of the said Act and will have jurisdiction to naturalize persons who become eligible under this Section and who reside within their respective jurisdictions.

"(d) With respect to persons who will become citizens or nationals of the United States under Article III of this Covenant or under this Section the loss of nationality provisions of the said Act will apply.

* * *

"ARTICLE IX

"NORTHERN MARIANA ISLANDS
REPRESENTATIVE AND CONSULTATION

"SECTION 901. The Constitution or laws of the Northern Mariana Islands may provide for the appointment or election of a Resident Representative to the United States, whose term of office will be two years, unless otherwise determined by local law, and who will be entitled to receive official recognition as such Representative by all of the departments and agencies of the Government of the United States upon presentation through the Department of State of a certificate of selection from the Governor. The Representative must be a citizen and resident of

the Northern Mariana Islands, at least twenty-five years of age, and, after termination of the Trusteeship Agreement, a citizen of the United States.

"SECTION 902. The Government of the United States and the Government of the Northern Mariana Islands will consult regularly on all matters affecting the relationship between them. At the request of either Government, and not less frequently than every ten years, the President of the United States and the Governor of the Northern Mariana Islands will designate special representatives to meet and to consider in good faith such issues affecting the relationship between the Northern Mariana Islands and the United States as may be designated by either Government and to make a report and recommendations with respect thereto. Special representatives will be appointed in any event to consider and to make recommendations regarding future multi-year financial assistance to the Northern Mariana Islands pursuant to Section 701, to meet at least one year prior to the expiration of every period of such financial assistance.

"SECTION 903. Nothing herein shall prevent the presentation of cases or controversies arising under this Covenant to courts established by the Constitution or laws of the United States. It is intended that any such cases or controversies will be justiciable in such courts and that the undertakings by the Government of the United States and by the Government of the Northern Mariana Islands provided for in this Covenant will be enforceable in such courts.

"SECTION 904. (a) The Government of the United States will give sympathetic consideration to the views of

the Government of the Northern Mariana Islands on international matters directly affecting the Northern Mariana Islands and will provide opportunities for the effective presentation of such views to no less extent than such opportunities are provided to any other territory or possession under comparable circumstances.

"(b) The United States will assist and facilitate the establishment by the Northern Mariana Islands of offices in the United States and abroad to promote local tourism and other economic or cultural interests of the Northern Mariana Islands.

"(c) On its request the Northern Mariana Islands may participate in regional and other international organization concerned with social, economic, educational, scientific, technical and cultural matters when similar participation is authorized for any other territory or possession of the United States under comparable circumstances.

* * *

SUBCHAPTER II – NATIONAL LABOR RELATIONS

§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively

safeguards commence from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

(July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.)

CHAPTER 4.
Nonresident Workers Act.

Article 1. General.

§4411. Nonresident Workers: Policy.
§4412. – Definitions.
§4413. – Preference for Resident Workers.
§4414. Conflict of Interest.

§4411. Nonresident Workers: Policy.

(a) The Legislature finds and declares that it is essential to a balanced and stable economy in the Commonwealth that residents be given preference in employment and that any necessary employment of nonresident workers in the Commonwealth not impair the wages and working conditions of resident workers.

The Legislature recognizes the need for alien labor at the present state of economic development but finds that the employment of nonresident workers should be temporary and generally limited to the duration of the specific job or employment for which the alien was recruited.

The Legislature finds that specific data regarding job category needs, availability of resident labor in particular employment categories, and impact of apprentice training programs, is currently minimal. It is the Legislature's intent that the implementation of this Chapter will generate reliable data upon which more specific alien labor policies can be developed.

(b) It is the intent of the amendments to the Act to provide stricter enforcement, control and regulation of nonresident workers. It is further the intent of this act to require resident workers to be at least 10% of every employer's management, supervisory and

non-supervisory work force, which is to be increased at least 2% annually so that at the end of five years resident workers comprise of at least 20% of every employers management, supervisory and non-supervisory work force, to prohibit the transfer of non-resident workers from one employer to another except as provided by law, to control the issuance of temporary work permits, to increase the job referral services provided to resident workers and to establish a four year maximum time period for non-resident worker to remain in the Commonwealth. Nonresident workers and their nonresident dependents shall not be eligible for permanent resident status.

Source: PL 3-66, §2 and PL 5-32, §2.

Commission Comment: In enacting Public Law 3-66, the "Nonresident Workers Act," effective August 18, 1983, the Legislature expressly repealed Title 49 of the Trust Territory Code. (PL 3-66, §§1, 20, 22).

§4412. *Nonresident Workers: Definitions.*

As used in this Chapter, the term:

(a) "Agreement" means a non-resident employment agreement between the Chief of Labor and an employer pursuant to Section 4433;

(b) "Available" means offering to perform any type of services or labor for an employer at the time and place, and under the terms and conditions, designated by such employer;

(c) "Certificate" means a certificate of labor and immigration issuable by the Director pursuant to Section 4435(b);

(d) "Chief" means the Chief of Labor;

(e) "Contract" means a contract between a nonresident worker and an employer, pursuant to Section 4434;

(f) "Director" means the Director of Commerce and Labor;

(g) "Division" means the Division of Labor of the Department of Commerce and Labor;

(h) "Employer" means any individual, partnership, association, or corporation hiring, employing, or otherwise engaging for compensation any resident worker or nonresident worker to perform services or labor within the Commonwealth, including any branch, agency, or instrumentality of the Commonwealth, but does not include the Trust Territory of the Pacific Islands or United States government;

(i) "Nonresident worker" means any available individual who is at least 18 years old and who is capable of performing services or labor desired by an employer and who is not a resident worker. Nonresident worker shall not include any immediate relative, spouse or children including legally adopted children of a U.S. citizen or any foreign investor; and

(j) "Job Classification" means the job classification described and listed as an occupational group under the Dictionary of Occupational Titles. Each time the words "job title" appear in 3 CMC, Division 4, the words "job classification" shall be substituted in its place.

(k) "Occupational Category" means the nine occupational categories listed under the Dictionary of Occupational Titles issued by the U.S. Department of Labor, which includes the following:

(1) Professional, Technical, or Management Occupation;

(2) Clerical and Sales Occupation;

(3) Service Occupation;

(4) Agricultural, Fisheries, Forestry and Relative Occupation;

(5) Processing Occupation;

(6) Machine Trade Occupation;

(7) Benchwork Occupation;

(8) Structural Work Occupation; and

(9) Miscellaneous Occupation.

(l) "Management" job classification shall mean the function of planning, organizing, coordinating, directing, controlling, and supervising any industrial or business project or activity with responsibility for results.

(m) "Supervisory" job classification shall mean the function to coordinate, direct, and inspect continuously and at first hand the accomplishment of industrial or business activity for ones employer.

(n) "Resident Worker" means any available individual who is capable of performing services or labor desired by an employer, and who is a citizen or national of the United States as defined in the Constitution of the Northern Mariana Islands or who has been granted national or citizenship status pursuant to Commonwealth law or who is legally residing without restrictions as to employment in the Commonwealth.

Source: PL 3-66, §3; as amended by PL 5-32, §3.

§4413. Nonresident Workers: Preference for Resident Workers.

Resident workers shall be given preference in employment in the Commonwealth. Nonresident workers shall be employed only as necessary to supplement the available labor force. No employer shall hire, employ, or otherwise engage for compensation any nonresident worker to perform services or labor in the Commonwealth except in strict accordance with the provisions of this Chapter and any rule or regulation issued under this Chapter.

Source: PL 3-66, §3.

§4414. Conflict of Interest.

No employee or official of the Department of Commerce and Labor or Division of Immigration and Naturalization, or his or her immediate relative as defined in 3 CMC 4303(m), shall own or have an equity interest in an employment agency or business engaged in recruiting or bringing into the Commonwealth a nonresident worker.

Source: PL 5-32, §4.

Commission Comment: PL 5-32, §4 became effective October 27, 1987.

Article 2. Administrative Provisions.

§4421. Chief of Labor: Functions and Duties.
§4422. Statistical Data.
§4423. Federal Grants and Programs.
§4424. Rules and Regulations.
§4425. Annual Report.

§4421. Chief of Labor: Functions and Duties.

For the purposes of this Chapter, and without limitation on the scope or extent of powers, duties, and responsibilities vested by any other provision of law, the Chief shall, under the supervision of the Director, have the following functions and duties:

(a) Establish and maintain a system of registration, referral, and other employment services to assist potential resident workers in obtaining employment and assist employers in locating resident workers.

(b) Establish or recommend methods for alleviating shortages of resident workers and reducing the need for nonresident workers through such means as advising residents, and residents graduating from the Northern Marianas College or other training institution and making job referrals and job placements into the private sector. The term "graduate" includes those residents who have successfully completed a certified apprenticeship, vocational, or trade training program established or sponsored by the Northern Marianas College or other organization recognized by the College or the Western Association of Schools and Colleges or other accredited organization.

(c) Oversee, monitor, and review the use of nonresident workers and all matters related to such use, including the health, safety, meals, lodging, salaries, and working hours and conditions of such workers, and the specific contractual provisions for the services or labor of such workers.

(d) Enforce, pursuant to Sections 4441-4446, the provisions of this Chapter and any agreement which the Chief enters into with any employer concerning the employment of nonresident workers.

(e) Require that employers accept such agreement or conditions for the payment of wages or benefits to nonresident workers, or any other agreement or contract provision, as the Chief determines to be necessary and consistent with the policy and purposes of this Chapter, and any such agreement, condition, or provision shall be legally enforceable in the courts of the Commonwealth.

(f) Establish occupational categories, minimum standards of qualification, and procedures for certification of nonresident workers.

Source: PL 3-66, §5; as amended by PL 5-32, §5.

Article 3. Procedural Requirements.

§ 4431. Procedures and Requirements: Employer Notifies Chief.
§ 4432. – 15-Day Advertising.
§ 4433. – Nonresident Employment Agreement.
§ 4434. – Approval of Contract by Director.
§ 4435. – After Contract Approved.
§ 4436. Preconditions for Employment of Nonresident Workers.
§ 4437. Restrictions and Obligations.
§ 4438. Health Certification.
§ 4439. Required Records.
§ 4440. Exemptions.

§ 4431. Procedures and Requirements: Employer Notifies Chief.

Any employer who desires to utilize the services of the division in locating resident workers to fill job vacancies or, if resident workers cannot be located, obtain permission to employ nonresident workers, shall notify the chief and report such vacancies, stating the place and nature of the employer's business, the number of workers desired, the occupational qualifications of these workers, the wages to be paid the workers, the date on which it is desired that employment commence, the island or islands on which the workers are desired, and any other information the chief may require or which the employer may deem appropriate. The chief may require the employer to justify any occupational qualification as appropriate to the nature of the position.

Source: PL 3-66, § 6(a).

§ 4432.Procedures and requirements: 15-Day Advertising.

Upon receipt of notification pursuant to section 4431, the chief shall first endeavor to fill the job vacancies reported by the employer by referral of resident workers registered with the division. In the event of inability to supply sufficient resident workers by such referral, the chief shall cause the existence of the vacancies and other applicable information regarding the jobs to be publicized. This publication shall include notice to all officers of the Department of Commerce and Labor, posting of notice in public places in the Commonwealth, advertising in a newspaper of general circulation in the Commonwealth, the use of the public media when appropriate, and any other means as the chief may determine to be feasible. This publication shall continue for a period of 15 days, except that the director may waive all or part of this period if he finds that a waiver is in the public interest and not inconsistent with the policy of this chapter.

Source: PL 3-66, § 6(b); as amended by PL 6-28,§ 3(b).

§ 4433. Procedures and Requirements: Nonresident Employment Agreement.

Not later than seven days after the date of expiration of the period of publication required pursuant to section 4432, upon a finding by the chief that there is no resident worker to fill any job vacancy announced in this publication, the chief shall determine under what conditions and for what period of time the employer shall be permitted to use a nonresident worker to fill the vacancy. If the employer desires to use a nonresident worker under

these conditions, the employer shall enter into a nonresident employment agreement with the chief to this effect. This agreement may apply to more than one vacancy, as the chief may, in his discretion decide, and shall include, in addition to any other provision the chief deems necessary, the following provisions:

(a) a statement that the employer requires one or more nonresident workers commencing on or about a stated date to perform services or labor on a stated island or islands;

(b) A statement of any occupational category or job title covered by the agreement and any qualification which must be met by any nonresident worker employed pursuant to the agreement;

(c) A statement of the wages the employer is paying or intends to pay each nonresident worker for each vacancy, occupational category, or job title covered by the agreement;

(d) A statement that the employer agrees to comply with the conditions stated in the agreement, the minimum employment conditions and other requirements applicable to such workers pursuant to this chapter, and any other applicable provision of law including a specific consent to entry pursuant to section 4442.

(e) A statement of the period of time for which the employer will be allowed to fill any position with a nonresident worker before the employer must attempt to locate a resident worker for the position by again complying with the provisions of this section;

(f) A statement that any contract offered to a nonresident worker pursuant to the agreement shall be contingent upon approval by the chief;

(g) A copy of a draft nonresident employment contract in a form, containing provisions including occupational category or job title, term of employment, location of work, work schedule, wage scale for regular and overtime work, and any deductions from pay, as may be required by law. In lieu of this copy, a statement that an acceptable previously filed or prescribed contract form may be used; and

(h) A statement that the employer will secure a bond or other surety for each nonresident worker as provided in section 4435 (a).

Source: PL 3-66, § 6(c).

§ 4434. *Procedures and Requirements: Approval of Contract by Director.*

After entering into a nonresident employment agreement pursuant to section 4433 of this chapter, an employer may use a nonresident worker to fill the job vacancy covered by this agreement, subject to the following procedures and conditions:

(a) Prior to entry of the nonresident worker into the Commonwealth for employment under this chapter or, if the worker is already within the Commonwealth, before commencing employment, the employer shall present to the Chief the affidavit described in subsection (b) of this section, a fully executed employment contract between the employer and the nonresident worker which shall conform to the requirements of subsection (c) of this section and shall be contingent on: (1) approval by the Chief, (2) the payment of the required fee, and (3) the disclosure of any other information or document required pursuant to the employment agreement or departmental regulations. Approval by the Chief, as required by this section, is a review of the contract

for compliance with the provisions of this chapter. Such review shall not subject the Chief or the Commonwealth government to liability on the employment contract, even if the Chief approves a contract which does not comply with all the provision of this chapter.

(b) The affidavit of the nonresident worker shall be sworn to by the worker and shall indicate:

(1) That the worker has a minimum of two years experience in the occupational field for which he or she is to be hired, except that two years total experience in any field shall suffice if the position is an unskilled position as designated by the chief;

(2) That the worker meets any occupational qualification for the position as published in the vacancy announcement required by subsection (b) of this section;

(3) The marital status of the worker, and the name, address, age, and relationship of any dependent;

(4) That the worker has not been convicted of a felony or other crime involving moral turpitude, except that the Director may waive this requirement if the Director finds that the presence of the worker in the Commonwealth would not be detrimental to the public interest; and

(5) If the affidavit of the nonresident worker is not executed in the Commonwealth, it shall be attested to under penalty of perjury as true by the employee's employment recruitment agency that shall be licensed to do business in the Commonwealth.

(c) The contract between the employer and the nonresident worker shall include specific itemization of any deductions from the employee's salary. No deductions may be levied against a nonresident worker unless:

(1) The expenses are specifically included in the employment contract entered between the employer and the nonresident worker and executed at the time of and place of recruitment of the nonresident worker;

(2) Expenses incurred by the employer for room and board are no more than the expenses actually incurred by the employer in providing such benefits; and

(3) Deductions of such expenses from employees compensation is not in violation of any applicable federal or Commonwealth law or regulation promulgated by the Director.

(d) After reviewing the information and documents submitted pursuant to subsection (a) of this section and within 30 calendar days of its receipt the Chief shall determine if the nonresident worker and the employment contract meet all the requirements of this chapter. If the nonresident worker does not qualify, the Chief shall notify the employer and the nonresident worker if the worker is within the Commonwealth, giving reasons for this determination in writing. If the employment contract is not in compliance, the Chief shall prepare a corrective addendum to be executed by the employer and the nonresident worker. When the Chief is satisfied that all requirements have been met, he shall signify his approval on the employment contract and any addendum and notify the employer.

(e) The Chief shall not approve Nonresident Worker Certificates for the following job classifications: taxi cab driver, secretary, bookkeeper, accounting clerk, messenger, receptionist, surface tour boat operator, bus driver, including tour bus driver, and telephone switchboard operator.

Further, the Chief shall not approve Nonresident Worker Certificates for employment unless the number of resident workers employed by the applicant employer is at least equal to the number of nonresident workers employed by the applicant employer in any of the following job classifications: retail trade clerk, retail trade cashier, hotel front desk clerk, janitor, security guard, custodian, and tour guide. However, the Director may conditionally waive this restriction in accordance with the provisions of 3 CMC § 4436(b).

In addition, the Chief shall not approve Nonresident Worker Certificates for any position for employment with the Commonwealth government. Except, the Chief may approve nonresident worker certificates for employment:

(1) In the Public School System; provided, however, that nonresident workers employed after September, 1993, as classroom teachers must be graduates of colleges or universities in the United States, or which are accredited by United States accrediting associations, or, alternatively, must be graduates of a college or university and pass a "BESTE" test for English proficiency or its functional equivalent as designated by the Board of Education;

(2) In the Department of Public Health and Environmental Services;

(3) In the office of the Public Auditor;

(4) In the Commonwealth Utilities Corporation for technical and professional employees;

(5) As may be required, by the Marianas Visitors Bureau for a language interpreter;

(6) For technical and professional employees in the Technical Service Division of the Department of Public Works;

(7) For instructors and research scientists at the Northern Marianas College;

(8) In the Department of Finance for technical and professional accountants, financial analysts, and revenue and tax auditors;

(9) For technical and professional employees, including light and heavy equipment operators in the Department of Natural Resources; or

(10) In the Department of Commerce and Labor, Central Statistics Division, for technical and professional staff, and for temporary or part-time employees as needed for statistical surveys and future censuses.

The Director, or his designated representative, shall insure that job classifications established by the employer, together with occupational qualifications and experience, are reasonable for the position being applied for, and in the event the Director or his designated representative determines that such job classification or occupational or experience is not reasonable for such position, the Nonresident Worker Certificate shall not be approved.

(f) Notwithstanding 1 CMC § 9112, no civil action may be brought by a nonresident worker against an employer for violation of the Minimum

Wage and Hours Act (4 CMC § 9211 *et seq.*) and/or the Nonresident Workers Act (3 CMC § 4411 *et seq.*) unless the nonresident worker has first filed a written complaint concerning those violations with the Chief of Labor no later than 30 days after the violation is alleged to have occurred. Said civil action, if any, shall be commenced in any court only after the Director or his designee, after a hearing, has issued a decision on the complaint favorable to the nonresident worker and the employer fails or refuses to pay any assessment made by the Director within 10 days after receiving notification of the Director's decision, the entire sum of money that the decision says is owed by the employer to the employee. Such payment shall be made through the Director.

(g) A nonresident worker who has left his or her employment whose contract of employment has expired, or who is no longer employed by the employer approved by the Chief, shall not be permitted to remain in the Commonwealth. Except that, a nonresident worker shall be allowed to remain in the Commonwealth for a period not to exceed 20 days in order to pursue a civil action against his or her employer for a breach of their employment contract, other civil or criminal claims, or to pursue violations of any Commonwealth or federal labor law. Provided, however, for a claim made against an employer for failure to pay the contract wages, a nonresident worker shall only be allowed to remain in the Commonwealth for a period of 30 days in order to pursue such action where a timely claim is made for failure to pay the contract wages and where the employer fails or refuses to pay the full sum of money as ordered by the Director within the 10 day period provided by this section. A nonresident worker who has left the Commonwealth shall be allowed to return no sooner than five days before

their scheduled trial date in the Commonwealth Superior Court or federal court. Such person will be required to exit the Commonwealth within three days after the termination of the trial, or any continuances thereof.

(h) Issuance of Nonresident Workers Certificates for waitresses, excluding restaurants or coffee shops, shall be limited to 15 waitresses or hostesses per employer for the Islands of Rota and Tinian and 10 waitresses or hostesses per employer for the Island of Saipan. The number of waitresses or hostesses shall be certified under penalty of perjury by the employer.

(i) The exceptions of subsection (e) of this section for the Department of Public Health and Environmental Services, the Public Auditor, the Commonwealth Utilities Corporation, the Department of Natural Resources, the Central Statistics Division of the Department of Commerce and Labor, and the Public School System shall expire September 30, 1995.

Source: PL 3-66, § 6(d)(1)-(3); as amended by PL 5-32, § 8; PL 6-5, § 317; PL 6-25, § 4; PL 6-28, § 1(b); PL 6-36, §§ 2, 3; PL 6-39, § 5(b); PL 7-4, §§ 2, 3; PL 7-34, §§ 1, 2; PL 7-45, §§ 3, 4, 5, 6, 8.

§ 4435. *Procedures and Requirements: After Contract Approved.*

(a) After receiving notice from the Chief that an employment contract has been approved, the employer shall deliver to the Chief a bond or other surety from a recognized insurance company in an amount and form acceptable to the Chief to secure the faithful performance of the duties and responsibilities of the employer and the departure of the

nonresident worker at the end of his period of employment.

(b) The Director and the Attorney General shall provide for a certificate to be used for both labor and immigration purposes. After receiving evidence of the bond or surety pursuant to subsection (a) of this section and after receiving any required fee, the Director shall within 30 calendar days issue such certificate and forward it to immigration authorities for such immigration clearance as may be required by law. This certificate shall include:

(1) The name of the nonresident worker;

(2) The name of his or her employer;

(3) The occupational category or job title;

(4) The nonresident worker's legal residence;

(5) The nonresident worker's citizenship;

(6) The date of expiration of the certificate; and

(7) The number of the nonresident employment agreement under which the worker is employed.

The nonresident worker shall keep a copy of this certificate on his person, or otherwise readily available at all times.

(c) No later than 30 calendar days after receipt of the Director's certificate, the Commonwealth immigration authority shall issue the appropriate entry documents or indicate specifically in writing its reasons for denying entry documents and transmit such denial to the Director and the employer.

Source: PL 3-66, § 6(d)(4)-(6).

§ 4436. *Preconditions for employment of Nonresident Workers.*

(a) No nonresident worker certificates shall be issued or renewed for an employer (other than a construction company or an agricultural employer), unless the employer or one of the employer's officers swears under penalty of perjury that at least 10 percent ("minimum percentage") of the employer's full-time work force in the Commonwealth is comprised of resident workers and that this minimum percentage has increased at least at the rate of two percent per year until such time that resident workers comprise 20 percent of the employer's work force, together with a sworn affidavit made under penalty of perjury listing the names, addresses, telephone numbers (if any), and the position applied for by citizens or permanent residents of the United States. Employers employing less than five but more than one employee shall employ at least one full-time resident worker.

(b) Provided, however, that if an employer demonstrates to the Director that he is unable to reach or maintain the percentage of a resident work force required by subsection (a) of this section, or the one-to-one ratio required by section 4434(e) of this chapter, despite a good faith attempt to do so, the Director may reduce the percentage to one that is reasonably attainable under the circumstances.

(c) No employer shall employ a nonresident worker in the Commonwealth unless at all times the employer pays its workers their full wages at least bi-weekly in United States dollars in cash together with a receipt with which to verify wages, hours and deductions or in checks that can be cashed by the workers in the Commonwealth.

(d)(1) No Nonresident Worker Certificate shall be issued or renewed for an employer unless the employer can document that all nonresident workers for whom the employer has received a certificate within the four years immediately preceding the application for such issuance or renewal are either currently employed by the employer, have been repatriated, have been transferred to another employer in the Commonwealth, or have died.

(2) In addition, any employer who fails to account for any such nonresident worker for whom the employer has received a certificate shall, after the Chief has conducted an administrative hearing pursuant to 3 CMC § 4444, be subject to a fine of $500 for each such unaccounted-for worker.

(3) Any corporation, an officer or director of which has been barred from employing nonresident workers under this subsection, shall likewise be barred from employing nonresident workers as long as such officer or director retains office with the corporation.

Source: PL 5-32, §§ 9, 10, repealing PL 3-11, § 7; amended by PL 6-28, § 6(b); PL 7-34, § 3.

§ 4437. *Restrictions and Obligations.*

(a) No employment contract, or nonresident employment agreement, registration, certification or permit, or the presence of an alien within the Commonwealth pursuant thereto, shall be grounds for naturalization or citizenship, or permanent residency except as may be otherwise provided by law.

(b) No nonresident worker employed pursuant to this chapter shall be paid less than any minimum wage applicable to the occupational category or job

title of the worker and provided by law. Any employment contract under this chapter shall provide that any future increase in the applicable minimum wage prior to the expiration of the term of the contract shall apply to work performed under the contract on or after the effective date of the increase. Any period of time during which the worker is required to be present at any location within the Commonwealth designated by his or her employer shall be considered working hours for purposes of determining wages and overtime pay.

(c) All nonresident employment contracts under this chapter shall provide that the employer is responsible and liable for the insurance or payment of all medical expenses of the nonresident worker, including cost of referral and evacuation for medical treatment outside the Commonwealth, and cost of the embalming and transportation of the body back to the country of origin in the event of death of the nonresident worker.

(d) No employer or nonresident worker shall execute any contract, make any other agreement, or change any existing contract, in writing or otherwise, regarding the employment of such worker, without the approval of the Chief, and no nonresident worker shall perform labor or services within the Commonwealth except pursuant to an approved contract or an approved change to this contract. Any nonresident employment contract or changes thereto which has not been approved by the Chief or which violates any provisions of this chapter shall, in the discretion of the Chief:

(1) Be voidable;

(2) Be grounds for certificate revocation;

(3) Be grounds to disqualify an employer from further use of any nonresident labor.

(e) A nonresident worker shall not be permitted to perform any services or labor within the Commonwealth for any employer other than the employer for whom the Chief has approved an employment contract with such worker. Nor may a nonresident worker perform any services or labor on a subcontract between the employer of record and any other employer, except that the Chief may approve such a subcontract between the employer for a particular job with a specified duration as part of the original employment contract. A nonresident worker who violates any provision of this subsection shall be subject to immediate deportation.

(f) Each employer shall give to any nonresident worker within his or her employ a copy of the approved employment contract with the worker, and no employer shall withhold from a worker any identification certificate, passport, entry permit, or other document related to the status of the worker.

(g) A nonresident worker shall not be required to leave the Commonwealth to maintain certification or to renew certification.

(h) No nonresident worker whose first entry into the Commonwealth for purposes of employment occurs after July 28, 1987, shall have a financial interest in or operate or engage in any business or become an employer.

(i) Immediate relatives of nonresident workers shall not be issued immediate relative entry permits unless the nonresident worker is paid an annual wage or salary of more than $20,000 and posts with the Chief of Immigration a bond or other surety guaranteeing the repatriation of the family members

for whom the nonresident worker seeks entry; provided, however, the income requirement of this subsection shall not apply for a period of not more than one year to nonresident workers whose immediate relatives were already in the Commonwealth on July 28, 1987.

(j) The Director shall require that no application for renewal of a nonresident worker certificate be issued, unless the employer submits evidence of payment of the monthly employee's withholding taxes and quarterly gross revenue taxes and attaches a copy of the employee's 1040 tax form.

(k) The Director shall cancel the certificate of a nonresident worker if the Director determines that a job position was advertised at a lower specified rate of pay but a nonresident worker is actually being paid a higher rate of pay subsequent to the nonresident worker certificate being issued.

(l) It shall be unlawful for an employer to hire or employ a person who is not lawfully in the Commonwealth or if such person is a nonresident worker if such nonresident worker's contract has not been approved by the Chief.

Source: PL 3-66, § 8; amended by PL 5-32, §§ 9, 11; PL 6-28, §§ 4(b), 5(d); PL 6-39, § 4; PL 7-34, § 4; PL 7-45, § 7.

Commission Comment: PL 7-34 and PL 7-45 both amended subsection (e) of this section. PL 7-34, § 4, repealed and reenacted subsection (e) to read as follows:

> (e) A nonresident worker shall not be permitted to perform any services or labor within the Commonwealth for any employer other than the employer for whom the Chief has approved an employment contract for

> such worker. However, a nonresident worker may perform services or labor pursuant to a subcontract between the employer of record who is licensed to provide such subcontracting services and any other employer, except that a nonresident worker shall not perform services or labor except as stated in the original employment contract and subject to prior approval by the Chief. Provided, however, said employer of record has filed with the Department a cash bond or real property bond, as determined by the Chief which runs to the Commonwealth; conditioned that the employer of record shall pay all amounts that may be adjudged against the employer by a nonresident worker which may include but is not limited to costs for transport to home country and medical expenses. A nonresident worker who violates any provision of this subsection shall be subject to immediate deportation. Subcontracting, pursuant to this section, shall be given preference to businesses partly and beneficially owned by U.S. citizens.

PL 7-34 became effective on August 9, 1991. PL 7-45-§ 7 of which amended subsection (e) without reference to PL 7-34 – became effective on December 10, 1991. Under the general rule of construction, when an amendment to a section ignores prior amendments of the same section, "if the new amendment purports to set out the original section as amended . . . and fails to reenact the prior amendments therein[,] the prior amendments are considered repealed." 1A N.Singer, *Sutherland Statutory Construction* § 22.32 (4th Ed. 1985 rev.). The Commission

applied this rule in codifying only PL 7-45, § 7, in this section.

§ 4438. Health Certification.

(a) Any nonresident worker admitted to the Commonwealth for employment under the provisions of this chapter, or any person admitted as a member of the family of such worker, shall have in his possession a certificate of freedom from communicable disease. This certificate shall have been executed not more than 30 days preceding the date of entry into the Commonwealth by a physician licensed to practice medicine in the jurisdiction of issue.

(b) Within 10 working days of initial entry into the Commonwealth of a nonresident worker for employment under this chapter or, if the worker is already present in the Commonwealth for some other purpose, within 10 working days after the Chief issues a nonresident worker identification certificate for the worker, the worker, together with any accompanying family member, shall undergo a physical examination in the Commonwealth performed by any medical physician licensed to practice general medicine in the Commonwealth by the Commonwealth Medical Profession Licensing Board. Any family member preceding or following the nonresident worker to the Commonwealth shall also undergo a medical examination by a medical physician licensed to practice general medicine in the Commonwealth by the Commonwealth Medical Profession Licensing Board within 10 working days after entry into the Commonwealth. The cost of any examination of a nonresident worker shall be borne by the employer. The cost of any examination of a member of the family of any nonresident worker shall be borne by either the worker or the employer, as the

employment contract shall provide. The Chief shall by regulation provide for annual physical examination of nonresident workers and family members in the Commonwealth by any medical physician licensed to practice general medicine in the Commonwealth by the Commonwealth Medical Profession Licensing Board when employment under this chapter will continue for more than one year. The cost of all examinations under this section shall reflect the total cost, including physician fees, of providing the examinations. Any nonresident worker or immediate family member who fails to comply with this section shall be subject to immediate deportation to the point of origin. All costs of repatriation of the nonresident worker shall be the responsibility of the employer.

(c) Any person subject to a physical examination pursuant to subsection (b) of this section shall surrender his or her certificate of freedom from communicable disease to the examining physician or other designated person at the time of the examination. Within 10 working days after the examination, the examing physician shall transmit the certificate to the Director of Public Health and Environmental Services for transmission to the Chief, together with findings as to whether there is any medical reason that the person should not be permitted to remain in the Commonwealth under this chapter. This finding shall be based on the medical probability that any disease, whether or not communicable, or any disability or any other medical matter, would result in significant danger to the health of the inhabitants of the Commonwealth or in the need for prolonged medical care or treatment in the Commonwealth.

(d) Upon receiving notice that there is any medical reason that any nonresident worker or

family member should not be permitted to remain in the Commonwealth, the Chief shall notify the employer and the nonresident worker, or family member, and the affected person shall immediately surrender his or her certificate to the Chief for appropriate action. The Chief shall transmit a copy of all pertinent documents through the Director to the Attorney General for immigration control, and the employer shall make arrangements for the affected person to depart the Commonwealth. This departure shall take place at the earliest possible time that it is medically safe for the affected worker to travel.

Source: PL 3-66, § 9; as amended by PL 5-32, § 12; PL 7-48, § 4.

§ 4439. Required Records.

Any employer of any nonresident worker shall keep and present immediately upon demand of the Chief or his authorized representative, and at such regular intervals as the Chief may by regulation require, the following information:

(a) The name, address, age, domicile, citizenship, point of hire, and contract expiration date of each worker;

(b) The occupational category or job title, and the wage rate or salary, of each worker;

(c) Payrolls showing the number of hours worked each week, gross compensation, any deduction, and net payments made to each worker;

(d) The number of employment-related accidents to nonresident workers, the name of any injured worker, type of injury, treatment, amount of

time lost from work, and whether hospitalization was required; and

(e) The number of illnesses of nonresident workers, whether or not employment-related, causing time to be lost from work, the name of any such worker, type of illness, treatment, amount of time lost from work, and whether hospitalization was required.

Source: PL 3-66, § 10.

§ 4440. *Exemptions.*

(a) The Chief, with the approval of the Director, may authorize exemptions from the following sections or parts thereof of this chapter: 4431, 4432, 4433(g), 4433(h), 4434(c), 4435(a), 4437(c) and 4439(a)-(c). These exemptions shall be specifically enumerated in an exemption employer agreement and may be granted to an individual employer for a particular project described in the agreement. Nonresident workers entering the Commonwealth pursuant to an exemption agreement shall not be permitted to transfer to another employer or project and shall depart the Commonwealth within 20 days of completion of their work. No family members or relatives may be permitted to accompany workers entering pursuant to an exemption.

(b) This chapter shall not apply to any person who represents a foreign government in the Commonwealth in a diplomatic, consular, or similar official capacity, or assists in such representation, as certified by the Governor; provided, that the person does not perform any proprietary or commercial activity for which a business license or permit is required by law.

(c) This Chapter does not apply to any person who qualifies as a holder of a Certificate of Foreign

Investment issued by the Director of Commerce and Labor.

Source: PL 3-66, § 16.

Article 4, Enforcement Provisions.

§ 4441. Enforcement: Investigations.
§ 4442. – Authority to Enter.
§ 4443. – Personnel Support.
§ 4444. – Administrative Hearing.
§ 4445. – Administrative Review.
§ 4446. – Judicial Review.
§ 4447. Remedies and Penalties.

§ 4441. Enforcement: Investigations.

The Chief or his designee shall conduct investigations as the Chief may deem appropriate and necessary to enforce this chapter, rules or regulations promulgated hereunder, or agreements or contracts entered pursuant hereto, or any injury to a nonresident worker, or working conditions, or employer-provided housing conditions; the Chief shall investigate and report in writing to the Director and Attorney General any death or injury of a nonresident worker which results in substantial physical or mental impairment.

Source: PL 3-66, § 14(a)

§ 4442. Enforcement: Authority to Enter.

The Chief or his designee may enter any worksite where nonresident workers are employed, or any nonresident worker employer-provided residential facility. Such entry may be at any time work is in progress, or any other reasonable time, and may be for general inspection purposes or in furtherance of a specific investigation. As a condition of and in consideration of any approval to

employ nonresident workers pursuant to this chapter any employer is deemed to agree to entry pursuant to this section, and no warrant shall be required. Refusal to permit such entry shall be a violation of this chapter.

Source: PL 3-66, § 14(b).

§ 4443. *Enforcement: Personnel Support.*

For purposes of carrying out responsibilities pursuant to this article, the Chief, with approval of the Director, may by agreement with another agency of the Commonwealth utilize with or without reimbursement the services, personnel, or facilities of the agency.

Source: PL 3-66, § 14(c).

§ 4444. *Enforcement: Administrative Hearing.*

(a) If upon an investigation pursuant to section 4441 the Chief has reason to believe that any provision of this chapter, or rule or regulation promulgated pursuant hereto, or any agreement or contract entered hereunder, has been or is being violated the Chief shall within 10 days either:

(1) Issue a warning and request to correct the violation to the alleged violator, or

(2) Issue a Notice of Violation and conduct a hearing pursuant to Section 9109 of Title 1 of this Code.

(3) When the Chief has elected to issue a warning and request to correct and the alleged violator has not complied within 10 days the Director shall immediately issue a Notice of Violation and conduct a hearing pursuant to Section 9109 of Title 1 of this Code.

(b) For purposes of hearings conducted pursuant to this Section 4444 and for purposes of Sections 9109 and 9110 of Title 1 of this Code:

(1) "Agency" shall mean the Chief or such hearing officer as may be appointed by the Director, and

(2) The agency shall have general power to issue subpenas [sic], summon witnesses, require production of books, papers, documents and records, administer oaths, and such other powers as may be necessary to effectively implement this Chapter.

(c) All hearings shall be commenced within 30 days of the issuance of the Notice of Violation. Notwithstanding any other provision of law, hearings may be public or closed at the discretion of the agency. Adequate notice shall be given to all parties and opportunity shall be made available to them to present such evidence as they may desire.

(d) The agency shall upon concluding the hearing issue findings, decisions and orders within 10 days. Issuance of findings, orders and decisions upon hearing shall be pursuant to Section 9110 of Title 1 of this Code, but shall not be judicially reviewable until final.

(e) In addition to such sanctions, orders and relief that may be elsewhere authorized the agency may:

(1) Cancel or modify a non-resident worker certificate;

(2) Cancel or modify a non-resident employment agreement;

(3) Cancel or modify a non-resident worker contract;

(4) Temporarily or permanently disqualify an employer from using any non-resident labor; Provided, that if any employer has been found to be in violation of this act by the Director after conducting an administrative hearing on two or more occasions such employer shall be subject to, in addition to any penalty pursuant to 3 CMC 4447(e), a fine not to exceed $2,000 for every additional violation.

(5) Transfer an affected non-resident worker to another employer with the consent of the worker and new employer.

(6) Impose such other sanction, order or relief that may reasonably give effect to the purposes and provisions of this Chapter.

(f) The Chief shall immediately notify the immigration authority of any cancellation or modification of a non-resident worker labor and immigration certificate.

Source: PL 3-66, § 14(d); as amended by PL 5-32, § 13.

Commission Comment: A reference in § 4444(e)(5) to PL 3-11, § 7, now repealed, has been deleted.

§ 4445. *Enforcement: Administrative Review.*

(a) Within 15 days of issuance any person or party affected by findings, orders or decisions of the agency made pursuant to Section 4444 may appeal to the Director by written notice. If no appeal is made to the Director within 15 days of issuance of the original findings, orders or decisions shall be unreviewable administratively or judicially.

(b) Upon review the Director may, at the Director's discretion:

(1) Restrict review to the existing record;

(2) Supplement the record with new evidence;

(3) Hear oral argument;

(4) Hear the matter de novo in which case the hearing shall be conducted pursuant to Sections 9109 and 9110 of title 1 of this Code.

(c) Upon completion of review the Director shall confirm or modify the agency findings, order or decision in writing within 10 days. Any modification shall include supplemental findings. The Director's decision shall constitute final action for purposes of judicial review.

Source: PL 3-66, § 14(e).

§ 4446. Enforcement: Judicial Review.

Judicial review of a final action of the Director is authorized after exhaustion of administrative remedies, and must be initiated within 15 days of the final action. Except as may be contrary to the provisions of this chapter, judicial review shall be pursuant to 1 CMC § 9112. Notwithstanding any other provision of law, however:

(a) Notice of all actions and proceedings pursuant to this section shall be served on the Attorney General, and

(b) Judicial review shall be confined to the record.

Source: PL 3-66, § 14(f), modified.

§ 4447. Remedies and Penalties.

(a) At the request of the Director, or of the Chief through and with the approval of the Director,

the Attorney General may institute a civil action in any court of record having jurisdiction for a temporary restraining order, injunction, or other appropriate remedy to enforce any provision of this chapter, or any rule, regulation, or order issued under this chapter.

(b) Any nonresident worker who is aggrieved by the failure or refusal of his employer to comply with the employment contract may make a complaint to the Chief. The Chief or his designee shall conduct an investigation under section 4441 of this article, take any action under section 4444 of this article, and shall make a determination in writing within 30 days of the filing of the complaint. Any appeal from the determination shall be made under section 4445 of this article; provided, that the Director or his designee shall not take longer than 15 working days to render a decision on any appeal that is made to him. If the Director determines that the employee is at fault and denies the relief requested by the employee in his complaint, the then present employer shall be liable for the health, safety and welfare of the employee in the Commonwealth, pending the employee's repatriation as the Director may order. Repatriation cost shall be the responsibility of the last employer employing a nonresident worker in the Commonwealth.

(c) If any person fails to comply with any provision of this chapter, or any rule, regulation, or order issued under this chapter, or any nonresident worker employment agreement, after notice of such failure and expiration of any reasonable period allowed by the Chief for corrective action, the person shall be liable for a civil penalty of not more than $500 for each day of the continuance of such failure. Subject to the approval of the Director, the Chief may

assess, collect, and compromise any such penalty. No penalty shall be assessed until the person charged with a violation has been given an opportunity for a hearing pursuant to section 4444 of this article.

(d) In any action taken directly by or on behalf of a nonresident worker, notwithstanding any other remedies that may apply, the worker that prevails in such action shall recover unpaid wages and overtime compensation, an additional equal amount as liquidated damages, and court costs. In all cases the court shall, as part of the judgment, render a finding as to the merits of the action. The filing of an action which is determined by the court to be unfounded or without merit shall be considered a material breach of contract and shall prevent reentry into the Commonwealth by the nonresident worker in the event the nonresident worker attempts reentry into the Commonwealth within five years from the date of the court's decision. Any employer who violates the provisions of this chapter or breaches an employment contract with a nonresident worker, in addition to any other damages which may be awarded the nonresident worker by the court, shall be awarded reasonable attorney fees. However, attorney fees shall not be recoverable against the Commonwealth.

(e) Any person who violates any provision of this chapter or any regulation or order issued under this chapter, or who makes any false statements to the Chief or his authorized representative, or to the Director, during the course of any investigation, hearing, or other proceeding under this chapter, shall, upon conviction, be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

(f) A nonresident worker shall not file suit to terminate his or her employment contract unless an

unsuccessful good faith attempt has been made with the Chief to settle the dispute the worker has with the employer. Similarly, an employer shall not file suit to terminate its employment contract with a nonresident worker unless an unsuccessful good faith attempt has been made to settle any dispute the employer has with the nonresident worker.

(g) It shall be unlawful and grounds for immediate deportation for any nonresident worker, after having filed a grievance as provided for in subsection (b) of this section, to perform services or labor for any employer other than that employer with whom he or she has an approved contract of employment.

Source: PL 3-66, § 15, modified; amended by PL 5-32, §§ 14, 19, modified.

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February 15, 1996

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Re: Nonresident Worker Act and
National Labor Relations Act

Dear Mr. Aloot:

This is in response to the proposed amendments and consolidation of the underlying regulations for the Nonresident Worker Act ("NWA").

Hafadai Beach Hotel ("Hafadai") has been and continues to be concerned about existing and future conflicts between the NWA and the National Labor Relations Act ("NLRA"). These concerns compelled Hafadai to file a declaratory relief action against the National Labor Relations Board ("NLRB") and the CNMI Department of Labor and Immigration ("CNMI-Labor") under Section 903 of the Covenant. The purpose of the lawsuit is to

obtain clarification of the current legal situation by asking the federal district court to declare which law – the NWA or the NLRA – preempts the other when the provisions of these laws conflict.

When Judge Munson denied Hafadai's request for injunctive relief, it was with the understanding that CNMI-Labor would be amending the NWA regulations to make them more "compatible" with the NLRA. Since that preliminary decision, Hafadai has awaited the proposed regulations. The Hotel also submitted a list of questions to assist CNMI-Labor in understanding the issues and addressing the conflicts. (A copy of that list is enclosed.)

As we previously explained, the conflicts between the NWA and the NLRA stem from the extensive control exercised by CNMI-Labor over employment of nonresidents. Unfortunately, the proposed amendments to the NWA regulations do little or nothing to lessen that control. Accordingly, all of the areas of conflict outlined in our list of questions remain.

Moreover, the proposed regulations raise additional questions which we believe will further complicate the conflict problem. These additional questions concern the following:

A. Preference For Resident Workers

The proposed regulations attempt to strengthen the Division of Employment Services and streamline the referral process. While Hafadai believes that streamlining of the referral process will help employers handle resident applications, the amount of control being given to

Employment Services raises a host of questions. For example:

* Will employers be barred from considering resident applicants who are *not* registered with Employment Services?

* If employers may consider resident applicants who are *not* registered with Employment Services, must the employer give first preference to the resident applicants who are registered?

* If Employment Services will be *prequalifying* resident applicants, does that mean an employer is barred from concluding (on its own) that the resident applicant is not qualified for the job?

* If Employment Services will be determining requirements and qualifications for a job as set forth in the DOT and GOE, does that mean that an employer can no longer adapt a DOT/GOE job classification to fit the actual job?

* What happens if a job the employer wants performed is *not* addressed by the DOT and/or GOE?

The proposed regulations creates two classes of resident applicants – those who register and those who don't. If the regulations require employers to give preference to the resident applicants who register above resident applicants who don't register, this will further complicate the preferential hiring process.

Under the present system, employers are prohibited from having nonresidents work outside the duties of their job classification set forth in the DOT and GOE. Only residents can work outside their classification, in combined jobs, and/or move from one job to another. However, it appears the proposed regulations will extend the

restrictive use of the DOT and GOE to resident employees as well. This will exacerbate an already difficult problem and could result in absurd situations where employers cannot direct employees to do work because the work is not covered by the DOT/GOE job descriptions.

Furthermore, we are also concerned the proposed regulations will make the Employment Services the *sole* judge of an applicant's qualifications. What happens if a resident applicant referred by Employment Services is judged by the employer to be unqualified for a job? Will the employer be prohibited from rejecting the applicant and from hiring a non-registered resident applicant who is better qualified? If so, the proposed regulations would further erode the employer's control over employment and will add still another layer of conflict between the NWA and NLRA.

B. Preference for TWAs

The biggest change in the proposed regulations is the creation of a preference category for TWAs. While we can understand the goal of trying to keep the nonresidents who are already in the CNMI with gainful employment rather than recruiting more nonresidents to enter the CNMI, we strongly believe the new preference will encourage employment litigation. This is because the proposed regulations also enable nonresidents with claims (local or federal) to obtain TWAs. When this provision is combined with the new preference for TWAs, the result is obvious. As nonresidents whose contracts expire are replaced by TWAs, these nonresidents will file complaints so that they can move up in the "preference" list.

Recent events demonstrate that nonresident workers have been using unfair labor practice charges and labor complaints as a method for extending their stay in the CNMI. These claims are clogging the administrative hearing processes of the CNMI and federal government. If the proposed regulations are enacted, there will be an avalanche of employee complaints which will dwarf the existing backlog. Indeed, we would not be surprised if most of the nonresident workers in the CNMI eventually become TWAs so that they can "move up" in the "preference pool."

More importantly, rather than decreasing conflicts with the NLRA, the new TWA preference may double the conflicts. At the present time, nonresidents whose contracts have expired may be renewed if no qualified resident applicant can be found. With the proposed regulations, there will be a growing class of TWAs for employers to hire if no qualified resident applicant is found. As nonresident workers whose contracts have expired are replaced by TWAs, there will be another opportunity for the replaced nonresident to file an unfair practice charge. In short, the proposed regulations will creating [sic] more opportunities for nonresidents whose contracts have expired to file unfair labor practice charges thereby increasing the number of conflicts with the NLRA.

In conclusion, Hafadai does not believe the proposed regulations lessen the conflicts between the NWA and the NLRA. The proposal *increases* the conflicts. Accordingly, Hafadai urges CNMI-Labor to: (1) reject the proposed amendments; and (2) commit to studying, understanding,

and resolving the conflicts between the NWA and the NLRA.

If you have any questions or comments, please feel free to contact us.

Very truly yours,

/s/ Anna M. Elento-Sneed
ANNA M. ELENTO-SNEED
MARCIA K. SCHULTZ

Enclosure
cc: Hafadai Hotel
G9601661

AREAS OF CONFLICT BETWEEN THE NWA AND THE NLRA

I. HIRING OF NONRESIDENTS

A. Union's Usual Demands

Unions usually negotiate with employers over the job duties that can be assigned to employees. Unions often take the position that: (1) more experienced and/or skilled employees should have priority over less experienced and/or skilled employees; and (2) if the employees are equally experienced and/or skilled, the employee with the most seniority (years of employment with the company) should have priority.

B. NLRB's Position

The NLRB does not believe a union contract which contains language similar to the above-described demands will be a problem. This is because the NLRB believes the hiring procedures for nonresidents are

merely designed to ensure that residents are advised of job vacancies. The NLRB also believes that: (1) employers in the CNMI have complete discretion to decide whether to hire a nonresident over a resident; and (2) CNMI Dept. of Labor and Immigration's ("Labor") review and approval of Nonresident Employment Contracts is routine and ministerial.

C. Questions for the CNMI

1. Will employers still be required to use the Dictionary of Occupational Titles and/or the Guide to Employment Classifications in preparing job titles and descriptions?

2. Will employers and unions be allowed to agree to job titles and job descriptions which are different from the DOT and/or GEC?

3. Will employers still be required to submit Job Vacancy Announcements to Labor for approval?

4. If an employer assigns duties to an employee which are *not* listed in his/her job description and the union does not object, will Labor object?

5. Will the employer mentioned in No. 4 above be required to submit a new Job Vacancy Announcement to Labor for approval?

6. Will employers be allowed to hire a nonresident with more experience and skills than a resident who is minimally qualified for the job?

7. Will Labor order an employer to hire a minimally qualified resident despite the employer's business decision to hire a nonresident?

II. TERMS AND CONDITIONS OF EMPLOYMENT

A. Union's Usual Demands:

Once a union becomes the certified collective bargaining representative for a group of employees, both the union and the employer are required to bargain in good faith over the terms and conditions of employment for those employees. The issues which are normally negotiated and included in a union contract include: (1) wage rates; (2) benefits; (3) hours of work; (4) job duties; (5) opportunities for work such as work assignments, overtime work, transfers, filling of vacancies, and promotions; (6) procedures for layoffs; and (7) discipline and terminations. Once the parties have reached agreement on the terms and conditions of employment, they are bound to follow the terms set forth in the union contract. Failure to follow the agreed upon terms can result in a complaint under federal labor law.

B. NLRB's Position

The NLRB does not believe the above process will conflict with the NWA because: (1) the NLRB believes that the provisions of the NWA which regulate the terms and conditions of employment for nonresidents are merely "statutory minimums; and (2) the NLRB also believes that Labor will waive its regulations and "rubber stamp" any agreement reached by the union and the employer. More importantly, the NLRB will require an

employer to comply with any agreements reached with the union or face unfair labor practice charges.

C. Questions For the CNMI

1. Will Labor allow a unionized employer to submit a union contract instead of DOL Form 88-005 for a nonresident covered by a union contract? If so, will the employer have to get approval from Labor before doing so? What would be the procedure for getting such approval and how long would it take?

2. If Labor will *not* allow the employer in No. 1 above to submit just the union contract, can the employer simply attach a copy of the union contract to the Nonresident Employment Contract (DOL Form 88-005)? Will there be any delay in getting approval from Labor? How long will the approval process take? What happens if the employer begins implementation of the union contract *before* approval from Labor is received?

3. If a union contract provides for wage and/or benefit increases for a nonresident during the term of the contract, will Labor require the employer to do a Job Vacancy Announcement for the position each time there is a change?

4. Will employers be allowed to employ nonresidents part-time (for less than 40 hours per week) if the union agrees?

5. Will nonresidents be allowed to work part-time for two employers if the union agrees? For example, will Labor approve an arrangement where the nonresident

works 20 hours for one employer and 20 hours for another employer?

6. Will employers be allowed to subcontract out the services of a nonresident if the union agrees? For example, will Labor approve an arrangement where the nonresident is hired by one employer who then subcontracts that nonresident to work for another employer? If the answer is yes, will there be any restrictions on these arrangements?

7. Will employers be required to provide nonresidents with one day off per work week even if the union agrees to allow the nonresidents to work 7 days a week?

8. Will Labor impose any restrictions on the wage rates negotiated between the union and the employer for a nonresident? Will Labor require the employer to obtain approval for the negotiated wage rates before implementing them?

9. Will Labor continue to require an employer to provide housing (or prove that it's available) and meals to nonresident employees if the union negotiates those benefits away?

10. Will Labor continue to limit deductions for the cost of housing and/or meals for nonresident employees if the union agrees to increase those deductions *beyond* the current maximums?

11. Will Labor continue to require an employer to provide medical benefits by paying 100% of the cost of medical insurance or paying for the entire cost of medical treatment for nonresidents? If the union agrees to another system (i.e. where the employee contributes to the

monthly premium for medical insurance), will Labor object?

12. Will Labor allow an employer and union to agree to provide higher wages and/or benefits to a nonresident than a resident in a similar job classification (i.e. based on skill, seniority, etc.)?

13. Will Labor continue to require that all of the circumstances under which a nonresident can be terminated be listed in his/her employment contract? What happens if the union contract simply specifies that an employer can terminate an employee for violating its house rules, a copy of which is provided to the union? Will Labor require the employer to obtain approval of any house rules?

III. TRAINING PROMOTIONS & TRANSFERS

A. Union's Usual Demands:

It is common for unions to require employers to: (1) provide on-the-job training to employees; (2) give preference to existing union members whenever there are vacant jobs to be filled; (3) give first preference to qualified employees for promotions before recruiting from outside the company; and (4) to allow employees to transfer from one position to another if they are qualified. All of these procedures are incorporated into the union contract after negotiation with the employer.

B. NLRB's Position:

As in the case of any "terms and conditions of employment," the NLRB will require an employer to

comply with any agreements reached with the union on training, promotion and transfer procedures. Failure to implement any agreed upon provisions will result in an unfair labor practice charge for the employer.

C. Questions for the CNMI:

1. If the union contract provides for on-the-job training of employees, including nonresidents, will Labor object?

2. Will Labor allow an employer to take such on-the-job training into consideration when determining whether a nonresident has sufficient "work experience" under the NWA for a particular job?

3. If the union contract allows the employer to temporarily transfer an employee, including nonresidents, into a higher rated position to substitute for an absent employee, will Labor object?

4. Will Labor allow an employer to take such "temporary transfer" time into consideration when deciding whether a nonresident has sufficient "work experience" to be promoted to that position permanently?

5. If the union contract requires the employer to allow an existing employee, including a nonresident, to transfer from one job to another, will Labor object? Will Labor require the employer to go through the Job Vacancy Announcement process before allowing a nonresident to be transferred – whether temporarily or permanently?

6. If the union contract requires an employer to give first preference to an existing employee who wishes to be

promoted into a higher rated position, including a nonresident, will Labor object? Will Labor require the employer to go through the Job Vacancy Announcement process before allowing a nonresident to be promoted?

7. If the union contract requires an employer to promote an employee, including a nonresident, into a higher rated position regardless of his/her work experience in that position, will Labor object? Will the nonresident still be required to have two years experience in the higher rated position before he/she can be promoted to it?

8. If two similarly qualified employees apply for the same job (one nonresident and one resident), and the union contract requires an employer to promote or give the job to the employee with the most seniority, will Labor object if a more senior nonresident is given the job over a less senior resident?

IV. RENEWAL OF NONRESIDENT EMPLOYMENT CONTRACTS

A. Union's Usual Demands:

In the U.S., unionized employees generally expect continuous employment with the employer from year to year. Union contracts frequently limit the circumstances under which an employee can be terminated to: (1) termination for just cause; and (2) layoff (whether for economic reasons or job elimination). Moreover, the fact that a union contract expires does *not* mean that an employee's right to employment expires.

B. NLRB's Position:

Once again, the NLRB will require the employer to abide by any union contract provision which limits termination from employment to terminations for cause or layoff. Moreover, federal labor law requires an employer to continue to abide by the terms of union contract (including any provisions on continuous employment) even after the contract has expired.

C. Questions for the CNMI:

1. Will employers still be required to go through the Job Vacancy Announcement process before they can renew a nonresident's Employment Contract?

2. Will Labor approve requests for Nonresident Employment Contracts which are longer than one to two years? For example, can an employer enter into an employment contract with a nonresident for three years or more?

3. Will the CNMI continue to require an employer to go through the Job Vacancy Announcement process for each position held by a nonresident at least once a year?

4. If the union asks the employer to agree to provide employment to nonresidents for an indefinite period of time (and as long as the nonresident is not terminated for just cause or laid off), would the CNMI government have any objection?

5. If the union contract requires the employer to renew a nonresident if he/she has more experience than any resident applying for the job, will the CNMI object?

6. Will an employer be required to replace a nonresident (no matter how skilled or how much seniority the nonresident has) as long as there is a minimally qualified resident interested in the job?

V. TERMINATIONS AND LAYOFFS

A. Union's Usual Demands:

As stated above, union contracts generally restrict terminations to "just cause terminations" or layoffs. Additionally, union contracts often require employers to follow certain procedures, which have been negotiated with the union, in conducting the terminations or layoffs. If an employer has correctly followed the procedures for terminating or laying off an employee, the employer generally has no further obligation towards that employee (i.e. continued benefit coverage, wages, etc.)

B. NLRB Position:

The NLRB will require an employer to follow whatever procedures are set forth in the union contract.

C. Questions For The CNMI:

1. Will Labor continue to review each termination of a nonresident or resident? What happens if the termination is consistent with the union contract – will Labor still conduct a review?

2. Under what circumstances will Labor order an employer *not* to terminate a nonresident or resident?

3. If an employer decides to lay off some employees because of economic or business reasons (i.e. job no longer needed), will Labor require the employer to lay off all nonresidents before any residents are laid off? What happens if the residents are not qualified to perform the remaining jobs?

4. If an employer wishes to lay off a resident because a nonresident has more skills and/or experience to do the job, will Labor object?

5. If a union contract requires an employer to lay off employees (regardless of whether they are nonresidents or residents) in order of seniority – with the least senior person being laid off first – will Labor object?

6. If, after a layoff, the employer is able to recall the laid off employees to work, will the employer be required to rehire the residents *before* any nonresidents?

7. If a union contract requires an employer to recall employees (regardless of whether they are nonresidents or residents) in order of seniority – with the most senior person being recalled first – will Labor object?

8. If the union agrees to allow the employer to discontinue medical coverage for nonresidents who have left employment with the company (whether by termination or layoff), will Labor continue to hold the employer responsible for the nonresident's medical expenses if he/she has not exited the CNMI.

9. Will Labor prohibit an employer from terminating a nonresident's benefits (i.e. housing, meals, etc.) if he/she has been properly terminated or laid off under the union contract?

VI. GRIEVANCES

A. Union's Usual Demands:

Union contracts invariably include an extensive procedure for processing complaints from employees (called "grievances"). If a unionized employee and/or the union believe that an employer has violated the union contract, the employee and/or the union may process a grievance through this procedure in an effort to overturn the employer's decision and obtain compensation for any damages. The last step in the grievance procedure is usually an arbitration before an impartial third person, mutually selected by the parties to adjudicate the dispute. Any decision rendered by the arbitrator, as well as any settlement reached by the parties, becomes binding upon the employer, the employee and the union.

Grievances under a union contract can cover a broad range of topics including: discipline, terminations, wages, benefits, working conditions, hiring, promotions, etc. In short, any item covered by the union contract (as well as employment decision affecting the employees' terms and conditions of employment) may be grievable.

B. NLRB Position:

Aside from supervising the conduct of union representation elections, the other main function of the NLRB is to ensure that the collective bargaining process (which includes the administration of the agreement) is properly followed by the parties. There is an extensive body of federal case law that requires employment disputes involving unionized employees to be resolved either

through the grievance procedure, the NLRB's administrative hearing procedures for unfair labor practice charges, or through civil litigation in federal court. The preference for this process is so strong that there is also a substantial body of law that says federal labor law (and the above processes) *preempt* any local laws. This is the primary reason the NLRB believes that it will have primary and superior jurisdiction over the claims of unionized nonresident employees.

C. Questions For The CNMI

1. Will nonresidents who feel they have been treated unfairly by an employer be required to follow the grievance and complaint procedures set forth in the NWA – even if their grievances are covered by the union contract and federal labor law?

2. Could a unionized employer substitute a grievance procedure provided in its union contract for the procedures set forth in the NWA and its regulations?

3. If a unionized nonresident filed a grievance under his/her union contract and a complaint with Labor over the same issue, would Labor defer to the grievance procedure under the union contract?

4. If a unionized nonresident filed a grievance under his/her union contract and a complaint with the NLRB over the same issue, would Labor defer to the NLRB procedure?

5. If a unionized nonresident filed a grievance under his/her union contract and a complaint under

federal labor law in federal district court for the same issue, would Labor defer to the federal district court?

6. If there is a conflict between the provisions of the NWA and its regulations, and the provisions of the NLRA and its regulations, which law prevails in the CNMI's opinion?

7. If an arbitrator issued a decision under the union contract, or a settlement was reached by the parties under the union contract, would Labor honor that decision or settlement? If not, would Labor process the complaint through its own procedures?

8. If the NLRB issued a decision under its procedures, or a settlement was reached by the parties under NLRB procedures, would Labor honor that decision or settlement? If not, would Labor process the complaint through its own procedures?

9. If the federal district court issued a decision under the federal labor laws, or a settlement was reached by the parties in accordance with federal district court procedures, would Labor honor that decision or settlement? If not, would Labor process the complaint through its own procedures?

10. If an arbitrator, the NLRB and/or a federal district court ordered, as part of the relief granted, that a nonresident be hired, would Labor honor that order?

11. If an arbitrator, the NLRB and/or a federal district court ordered that a resident be terminated and a nonresident hired in his/her place, would Labor honor that order?

12. If an arbitrator, the NLRB and/or a federal district court ordered that a nonresident be given preference over a resident (i.e. in hiring, layoff, promotion, etc.), would Labor honor that order?

VII. STRIKES

A. Union's Usual Demands:

Strikes are part of a union's "arsenal of weapons" for pressuring an employer into taking certain actions. Most strikes occur during collective bargaining negotiations. In these economic strikes, the unionized employees refuse to come to work to force the employer into agreeing to the union's bargaining proposals. Striking employees often put up picket lines (striking employees march back and forth holding signs and generally chanting) around the employer's place of business. Sometimes picket lines will also be placed around other companies who may be considered "allies" or "alter egos" of the primary employer.

There are other types of strike conducted by unions including unfair labor practice strikes, recognitional picketing, area standards picketing, etc. Each of these strikes have different purposes. As a practical matter, the effect is still the same. Employees withhold services from the employer in order to force it to comply with union demands. Employees also engage in picketing.

B. NLRB Position:

Strikes are a standard part of federal labor law. The NLRB has "rules" on what can and cannot be done during each type of strike. One rule allows a struck employer to withhold wages and benefits for striking employees. Another rule allows a struck employer to either permanently or temporarily replace a striking employee. However, once the strike is over, the employer is required to give the strikers first preference of reinstatement to any position that is available after the strike ends. Still another rule allows an employer to terminate an employee who engages in an unlawful strike.

C. Questions For The CNMI:

1. If nonresident employees were to engage in an *unlawful* strike against an employer, will the employer be allowed to terminate the nonresidents? If these nonresidents then file claims to protest their terminations, will they be allowed to remain in the CNMI pending the hearing on their complaint? Will the employer that terminated them be required to continue providing wages, housing, meals and/or medical coverage for them?

2. If unionized nonresidents were to engage in a *lawful* strike and the employer chose to hire replacements, would the employer still be required to provide wages, housing, meals and/or medical coverage for any replaced nonresident strikers?

3. If unionized nonresidents were to engage in a *lawful* strike and the employer chose to hire replacements,

would the employer still be required to provide wages, housing, meals and/or medical coverage for any strikers?

4. If unionized nonresidents were to engage in a *lawful* strike and the employer chose to hire nonresident replacements, would the employer be required to go through the procedure for hiring nonresidents under the NWA?

(SEAL) **UNITED STATES GOVERNMENT**
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

March 28, 1996

C. Sebastian Aloot
Acting Attorney General
Civil Division
Office of the Attorney General
Commonwealth of the Northern Mariana Islands
P.O. Box 10007
Saipan, MP 96950

Re: National Labor Relations Board Comments on Proposed Rules and Regulations, Department of Labor and Immigration

Dear Mr. Aloot:

Enclosed for consideration are the National Labor Relations Board's Comments on Proposed Rules and Regulations of the Department of Labor and Immigration, Commonwealth of the Northern Mariana Islands. As you will note, the Board has requested amendments to the Proposed Rules which will recognize the application of the National Labor Relations Act to nonresident workers in the Commonwealth, and establish the NLRA's primacy over CNMI law.

As we have expressed in the past, the Board would like to work with the CNMI government in a cooperative effort to resolve the conflicts which have arisen concerning the Board's attempts to enforce the NLRA in the Commonwealth. We recognize that our position does not

always coincide with the position of the CNMI. However, by working together to resolve the conflicts we hope to avoid the necessity for litigation.

We appreciate the opportunity to express our position on the Rules, and hope to continue to provide input into any future rulemaking which may impact federal labor laws. If you have any questions, please feel free to contact me.

Sincerely,

/s/ Fred Feinstein
Fred Feinstein
General Counsel

(SEAL) **UNITED STATES GOVERNMENT**
NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

March 28, 1996

National Labor Relations Board's Comments on Proposed Rules and Regulations of the Department of Labor and Immigration, Commonwealth of the Northern Mariana Islands

I. Introduction

The National Labor Relations Board ("the Board") submits these comments to the Proposed Rules and Regulations ("Proposed Rules"), of the Department of Labor

and Immigration, Commonwealth of the Northern Mariana Islands, in response to the CNMI's solicitation of comments. These comments address Proposed Rules which may interfere with the enforcement of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.* As set forth in detail below, the major areas of concern include the Board's ability to obtain reinstatement of nonresident workers under the NLRA, notwithstanding the Commonwealth's preference system for resident workers, and the ability of nonresident workers to remain in the CNMI pending resolution of Board proceedings. Generally, the Board's comments that follow are grounded on its view that the CNMI's Rules for nonresidents cannot be used as a basis to discriminate against these employees for exercising their Section 7 rights under the NLRA.

II. Comments

A. Additions to General Provisions of Rules

The Board requests that a provision be added to the Rules and Regulations recognizing that the NLRA applies to nonresident workers, that the NLRA preempts a Regulation section to the extent that that section conflicts with the NLRA, and that the Rules and Regulations and CNMI law should not be applied to interfere with employee rights under the NLRA.

The Board's position on preemption is supported by the Supreme Court doctrine, "*Garmon* preemption," which prohibits states from regulating activity that the NLRA protects, prohibits, or arguably protects or prohibits. *See San Diego Building Trades Council v. Garmon,* 359

U.S. 236 (1959); *accord, Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 286 (1986). *Garmon* preemption is designed to prevent state and local interference with the Board's interpretation and enforcement of the integrated scheme of regulation established by the Act. *See Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S. Ct. 1190, 1194-95 (1993) ("*Boston Harbor*").

Section 502(a) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant"), Pub.L.No. 94-241, 90 Stat. 263 (1976), *reprinted in* 48 U.S.C.A. § 1681 note (1987), generally incorporates federal laws into the legal framework for the CNMI. Moreover, the Ninth Circuit has held that the NLRA is applicable to the CNMI. *See Micronesian Telecommunications Corp. v. NLRB*, 820 F.2d 1097 (9th Cir. 1987). Thus, it cannot seriously be disputed that the *Garmon* preemption doctrine could apply to the conduct of CNMI and its agencies. Further, even if the NLRA and CNMI's immigration laws and regulations do conflict, the supremacy doctrine requires that CNMI's laws and policies give way to federal labor law. *See A&E Pacific Const. Co. v. Saipan Stevedore Co.*, 888 F.2d 68, 70-71 & 71 n.4 (9th Cir. 1989); *U.S. ex rel. Richards v. De Leon Guerrero*, Misc. No. 92-00001, 1992 WL 321010, *29 (D.N.M.I. 1992), *aff'd*, 4 F.3d 749 (9th Cir. 1993).

Further, as set forth below, the Board has addressed specific provisions of the Proposed Rules which may interfere with enforcement of the NLRA. In addition, the Board notes that employers can abuse the rules, as well as the Nonresident Workers Act, so as to interfere with the NLRA. For example, an employer can purposefully

breach the employment contract of a nonresident worker who is a union supporter. Pursuant to Proposed Rule II(B)(2)(d), see *infra*, the breach would prevent the renewal of that nonresident worker's labor certificate. To discourage such possible abuses of CNMI law, and also to address the general application of law and preemption principles set forth above, the following should be inserted as a general provision in the Rules:

"These Rules and Regulations recognize that the NLRA applies to nonresident workers, that the NLRA preempts any section within these Rules and Regulations to the extent that it conflicts with the NLRA, and that these Rules and Regulations as well as any other CNMI law or regulations shall not be applied or interpreted so as to interfere with any rights of employees under the NLRA."

B. Preference for Resident Workers

To the extent that the CNMI's preference system for employing resident workers interferes with the Board's ability to enforce the NLRA, it is preempted pursuant to the Supremacy Clause of Article VI of the Constitution. As just stated, it is well-established that preemption is appropriate to avoid interference with the Board's primary jurisdiction to enforce the NLRA, including granting remedies. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 276 (1976). Thus, in the event that an employer is ordered to reinstate an employee pursuant to the provisions in Section 10 of the NLRA, 29 U.S.C. §160, or if an employer agrees to settle a Board proceeding by

reinstating employees, the employer must be permitted to comply with that order or settlement agreement, notwithstanding the preference required by Section II(A)(1) of the Proposed Rules and any provisions of CNMI law. The following Proposed Rules should be modified or waived accordingly:

1. Section II(A)(1):

Current Proposed Rule: "a. Every employer shall give preference in employment to resident workers in any job vacancy for which such workers are available and qualified."

Amend to: "a. Except to the extent required to comply with agency or court orders or settlements agreed to pursuant to federal law, every employer shall give preference in employment to resident workers. . . . "

2. Section II(B)(1)(c)(3):

To the extent that reinstatement requires an employer to file an "Initial Application," the requirement that an employer provide a "Statement of Compliance with 3 CMC §4436(a)" should be waived if necessary. Section 4436(a) of the Nonresident Workers Act provides that "[n]o nonresident worker certificates shall be issued or renewed for an employer . . . unless . . . at least 10 percent . . . of the employer's full-time work force in the Commonwealth is comprised of resident workers and that this minimum percentage has increased at least at the rate of two percent per year until such time that resident workers comprise 20 percent of the employer's work force. . . . " If reinstatement of a nonresident worker requires the employer's workforce to be comprised of less

than the minimum number of resident workers, this requirement should be waived. It should be noted that the Nonresident Workers Act already provides for a waiver of this requirement by the Director if an employer demonstrates that he is unable to reach or maintain the required percentage of resident work force. *See* 3 CMC § 4436(b). In these circumstances, a provision similar to the one proposed above should be inserted, as follows:

Amend above-quoted provision to: "Except to the extent required to comply with agency or court orders or settlements agreed to pursuant to federal law, no nonresident worker certificates shall be issued or renewed for an employer. . . . "

3. Section II(B)(2)(a):

This section sets forth "Procedures and Requirements" for obtaining renewals of labor certificates. Subsection (7) requires a "Form of Conditional Waiver," explained in the Proposed Rules as a "[c]ertification by the Director of Employment Services that there are no nonresident workers available to fill the job vacancy." Presumably, this Proposed Rule erroneously states that the certification is that no *nonresident* workers are available, but the certification would be that there are no *resident* workers available. To the extent that this is the requirement, it must be waived to permit the reinstatement of a nonresident worker without regard to the preference, as follows:

Insert at end of subsection 7: "This requirement shall be waived to the extent required to comply with agency or court orders or settlements agreed to pursuant to federal law."

4. Section X(C)(4):

This section appears to provide a secondary preference system, whereby nonresident workers eligible for Temporary Work Permits are given preference over other nonresident workers. As discussed above for the preference system for residents, to the extent that this secondary preference system interferes with the ability to reinstate a nonresident worker pursuant to the NLRA, it must be waived.

Insert at end of first paragraph: "This requirement shall be waived to the extent required to comply with agency or court orders or settlements agreed to pursuant to federal law."

C. Temporary Work Permit/Ability to Remain in CNMI Pending Final Order in Board Proceeding

The granting of Temporary Work Permits for nonresident workers who have filed unfair labor practice charges with the Board, or on whose behalf charges have been filed, is critical to enforcement of the NLRA since, without this document, nonresident workers cannot seek employment and cannot work legally pending resolution of Board charges.[1] As now written, however, the

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[1] The comments herein regarding Temporary Work Permits apply equally to "Work Memoranda." While neither the current rules nor the Proposed Rules provide for this document, it is the Board's understanding that a Work Memorandum is issued by the CNMI Department of Labor and Immigration once a nonresident worker files a labor complaint under CNMI law, authorizing the nonresident worker to seek alternate employment and then obtain a Temporary Work Permit.

Proposed Rules do not provide for the granting of Temporary Work Permits for nonresident workers who could *not* also file a claim under CNMI law. Section X(A)(9) states that a Temporary Work Permit may be granted upon showing "that the nonresident worker has filed a claim with the appropriate Federal agency or court which could otherwise be filed with the Division of Labor." *The Interim Policy on Treatment of Labor Complaints Filed With Federal Agencies, issued on February 24, 1996, amends this provision, and should be incorporated into the Proposed Rules to allow employees who have filed unfair labor practice charges to obtain Temporary Work Permits pending a Final order in the Board proceeding, notwithstanding their inability to file claims under CNMI law.*

Likewise, provisions governing the ability of nonresident workers to remain in the CNMI pending resolution of labor claims should be amended to accommodate claims filed under the NLRA. The Board must be able to investigate and prosecute its cases, which requires that the Board have access to nonresident workers who are witnesses in such proceedings. The Board must additionally have the practical ability to obtain reinstatement of nonresident workers. It should be noted that Section 4434(g) of the Nonresident Workers Act already provides for an accommodation of nonresident workers with claims under the NLRA, although prior to the Interim Policy, the CNMI had not interpreted the statute to provide the accommodation. Section 4434(g) states: "[A] nonresident worker shall be allowed to remain in the Commonwealth for a period not to exceed 20 days in order to pursue a civil action against his or her employer for a breach of their employment contract, other civil or

criminal claims, or to pursue violations of any Commonwealth *or federal labor law.*" (Emphasis added.)

Moreover, it is our understanding, as expressed in the "Background" of the February 24, 1996 Interim Policy, that, at least as to workers with claims under CNMI law, Section 4434(g) has been applied to allow nonresident workers to remain in the Commonwealth for a period longer than 20 days, including "during the pendency of a complaint alleging a violation of the Non-Resident Workers Act and until a written decision is issued on that complaint." The 20-day period should similarly be extended for nonresident workers who have filed Board charges. Moreover, it is the Board's position that such nonresident workers should be permitted to remain in the Commonwealth through the issuance of an Final Order by the Board and, if applicable, through decision of a United States Court of Appeals enforcing a Board order.

Finally, we note that "transfer relief" may be available for nonresident workers who file claims under CNMI law. As set forth below, this relief should also be available for nonresident workers who have filed Board charges.

The following Proposed Rules should be modified or waived accordingly:

1. Section X(A)(9):

Current Proposed Rule: "Temporary Work Permit may be granted by the Director of Labor or his designee . . . Upon showing that the nonresident worker has filed a claim with the appropriate Federal agency or court

which could otherwise be filed with the Division of Labor."

Amend to: " . . . Upon showing that the nonresident worker has filed a claim with the appropriate Federal agency or court, including the National Labor Relations Board."

2. Section II(B)(1)(c)(4):

This section, which is one of the requirements to be satisfied for an employer to obtain permission to hire a nonresident worker, provides that an employer must submit a Statement of Compliance with 3 CMC § 4434(g). As set forth above, Section 4434(g) of the Nonresident Workers Act allows nonresident workers to remain in the Commonwealth to pursue actions against employers. While we find it unclear how the employer is to "comply" with this section, we reiterate that any application of Section 4434(g) must be construed as allowing nonresident workers to remain in the Commonwealth to pursue Board charges through final order, notwithstanding that the nonresident worker's claim does not state a cause of action which could be filed with the Division of Labor.

3. Sections VI(F)(9) and (10):

These sections provide for "transfer relief" to be granted by a Hearing Officer upon the conclusion of an administrative hearing under CNMI law, or by the Director of Labor in the event of merger, acquisition, reorganization, or incorporation of a valid business entity. Transfer relief should also be made available to nonresident workers who have filed Board charges.

4. Section II(B)(2)(c):

This section provides that "[a]ny renewal applications with supporting documents filed with the Division of Labor after the expiration of the nonresident worker's current labor certificate shall be denied." In the event that reinstatement is ordered pursuant to Section 10 of the NLRA, or in the event that an employer agrees to a settlement of a Board administrative case which includes reinstatement, the employer must be permitted to obtain a renewal of an identification certificate, if necessary, regardless of whether a nonresident worker's previous labor certificate expired. The following language should be inserted at the beginning of this section: "Except to the extent required to comply with agency or court orders or settlements agreed to pursuant to federal law. . . . "

5. Section II(B)(2)(d):

This section provides that "[n]o application for any renewal shall be permitted if the employer has not complied with the provisions of an employment agreement of any nonresident worker under their employment." As with the provision discussed above (Section II(B)(2)(c)), in the event that reinstatement is ordered pursuant to Section 10 of the NLRA, or in the event that an employer agrees to a settlement of a Board proceeding which includes reinstatement, the employer must be permitted to obtain a renewal of an identification certificate, if necessary, regardless of whether the employer has not complied with provisions of the employment agreement. The following language should be inserted at the beginning of this section: "Except to the extent required to

comply with agency or court orders or settlements agreed to pursuant to federal law. . . . "

6. Section II(B)(3)(e):

This section provides that "[a]n identification certificate shall be returned by the employer to the Division of Labor upon its expiration. It may be cancelled by the Division of Labor for refusal by the employer or employee to comply with the labor laws, rules or regulations of the Commonwealth." If a nonresident worker files an unfair labor practice charge and/or a complaint under CNMI law, the employee's identification certificate should not be subject to cancellation, since, in effect, the employer would obtain a benefit from its own violations. In these circumstances, this section should be waived, and the employee should be able to continue working.

Insert at end of section: "This requirement shall be waived to the extent required to comply with agency or court orders or settlements agreed to pursuant to federal law."

7. Section III(G):

This section provides that "[n]onresident workers sent home for violating or prematurely terminating their contractual agreement without cause shall not be allowed to return to work in the Commonwealth for a minimum of one (1) year." In the event that a nonresident worker files a charge alleging that the reason for his voluntary departure or deportation was pretextual, i.e., that he voluntarily departed or was deported *not* "for violating or prematurely terminating their contractual agreement," but rather, because he exercised rights contained in the

NLRA, this section must be waived to permit investigation and prosecution of charges, or reinstatement of the nonresident worker.

Insert at end of section: "This requirement shall be waived to the extent required to comply with agency or court orders or settlements agreed to pursuant to federal law."

D. Waiver of Claims

Sections II(B)(2)(a)(8) and II(B)(2)(e) of the Proposed Rules provide that in order to obtain a renewal of a labor certificate, a nonresident worker must waive all claims which arose during the previous period of employment. Similarly, Section VI(F)(10)(a)(vi) provides that in order to obtain transfer relief as a remedy for an employer's violation of CNMI law, nonresident workers must sign an affidavit stating, *inter alia*, that they have "neither filed nor intend to file a labor complaint against their employer of record. . . . " These provisions cannot be applied to include claims arising from the NLRA, since a state cannot burden an employee's ability to file charges under the NLRA. *See Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 239-40 (1967); 29 U.S.C. § 158(a)(4). To avoid this problem, these provisions could be amended to require waiver of local law only, as follows:

1. Sections II(B)(2)(a)(8) and II(B)(2)(e):

Current Proposed Rule (Section II(B)(2)(e)): "As a precondition of renewal, the nonresident worker must waive any or all claims against the renewing employer

which may have arisen during the previous period of employment."

Amend to: "As a precondition of renewal, the nonresident worker must waive any or all claims under CNMI law against the renewing employer which may have arisen during the previous period of employment."

The changes to Section II(B)(2)(a)(8) should be the same.

2. Section VI(F)(10)(a)(vi):

Current Proposed Rule: "[Nonresident workers] must state that they have neither filed nor intend to file a labor complaint against their employer of record. . . . "

Amend to: "[Nonresident workers] must state that they have neither filed nor intend to file a labor complaint under CNMI law against their employer of record. . . . "

E. Implementation of Collective Bargaining Agreements

While not addressed in the Proposed Rules, the Board has concerns about the impact of CNMI law, rules and regulations regarding nonresident employment agreements on the implementation of collective bargaining agreements. It is the Board's position that a negotiated collective bargaining agreement should be implemented for all employees at the same time, regardless of whether individual employment contracts are still in effect. It has been held that "individual agreements, under the comprehensive scheme of labor relations established by Congress, are pre-empted by subsequent collective bargaining. . . . " *Arnold v. U.S. Indus.*, 111 LRRM

2714, 2720 (W.D. Va. 1981), *aff'd*, 705 F.2d 441 (4th Cir. 1983). To accomplish this, a Rule should be added to provide that where there is a conflict between the terms of an individual employment contract and a collectively-bargained agreement, the terms of the collective bargaining agreement will govern. Suggested language is as follows:

> "Any employment contract entered into shall be deemed to incorporate by reference the terms of any agreement collectively bargained by a labor organization within the meaning of Section 2(5) of the National Labor Relations Act, 29 U.S.C. § 152(5), whether the collective bargaining agreement is negotiated prior to or subsequent to the execution of the employment contract. Any terms of the employment contract inconsistent with the terms of a collective bargaining agreement shall be superseded by the collective bargaining agreement."

III. Conclusion

As set forth above, the Proposed Rules should be amended and/or interpreted to acknowledge the NLRA's application to nonresident workers, to accommodate the NLRA and to the extent the Rules conflict with the NLRA, to acknowledge that the NLRA preempts that Rule section, and to avoid any application of the Rules which would interfere with employees' Section 7 rights. The major areas of concern for the Board include the Board's ability to obtain reinstatement of nonresident workers under the NLRA, notwithstanding the preference system for resident workers and the ability of nonresident workers to remain in the CNMI pending a final

order in the Board proceeding. The Board also believes that the Proposed Rules requiring employees to waive all claims against employers in order to obtain renewals of work permits is in clear violation of law if applied to claims under the NLRA. Finally, as to the concern about the implementation of negotiated collective bargaining agreements, it is the Board's position that they should be implemented as to all employees at the same time, regardless of whether individual employment contracts are still in effect.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
2ND FLOOR ADMINISTRATION BLDG., CAPITOL HILL, SAIPAN, MP 96950
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OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

August 8, 1997

Clerk
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1526

Re: *Saipan Hotel Corporation v. NLRB* (Appeal Nos. 96-70403, 70483)

Dear Sir/Madam:

In accordance with Circuit Rule 36-4, the Commonwealth of the Northern Mariana Islands ("CNMI"), as *amicus curiae* in the above-referenced case, respectfully requests that the memorandum opinion issued in the above-referenced case be published. The memorandum opinion in the instant case was issued in conjunction with this Court's published opinion in Case Nos. 96-70076 and 70198. The CNMI believes that having the Court's disposition of both cases on the record will aid in future interpretations of the Court's intent. In addition, the Court's disposition of this case meets the criteria for publication as enumerated in Circuit Rule 36-2 (e), as there is a published opinion by an administrative agency in this case.

If you have any questions, please feel free to call me at the number listed on the letterhead or contact Assistant

Attorney General Nancy Gottfried at 670-664-3157, fax 670-664-3153.

Thank you for your assistance in this matter.

Very truly yours

/s/ Robert Dunlap II (N.J.G.)
Robert Dunlap II
Attorney General (Acting)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion of Amicus Curiae the Commonwealth of the Northern Mariana Islands to Have the Memorandum Opinion Published was this 8th day of August, 1997, served via first-class mail, postage prepaid, upon the following:

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/s/ Robert Dunlap II (N.J.G.)
Robert B. Dunlap II

[SEAL] **UNITED STATES GOVERNMENT**
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

August 15, 1997

Cathy A. Catterson, Esq.
Clerk, United States Court of
Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Nos. 96-70403, 96-70483 – *Saipan Hotel Corp. v. NLRB*
(9th Cir.)
Board Case Nos. 37-CA-3977 et al

Dear Ms. Catterson:

Please transmit this letter to the panel that decided the above cases: Circuit Judges Norris, Hall, and Tashima.

We have received a copy of a letter from amicus curiae, the Commonwealth of the Northern Mariana Islands ("CNMI"), requesting that the memorandum opinion issued in the above cases on June 12, 1997, be published to "aid in future interpretations of the Court's intent." The National Labor Relations Board ("the Board") believes that the CNMI is referring to the last substantive paragraph of the memorandum opinion, which reads as follows:

> Although we hold that the remediation the NLRB ordered in this case did not violate the CNMI's immigration law, we do note that potential for conflict does exist between some remedies available under the NLRA and the CNMI's immigration law and policies. The

NLRB should be careful, as it apparently was in this case, to respect the CNMI's sovereign control over its immigration matters.

The Board believes that the CNMI seeks publication of the opinion so that, in any future case in which a conflict between the Board's remedial order and CNMI law is asserted, this paragraph can be cited as authority for the proposition that CNMI law should prevail.

The Board adheres to the position, as set forth at pp. 43-46 of our brief in these cases, that any such conflict must be resolved in favor of the Board. However, given the Court's correct conclusion that no conflict exists in this case, any ruling on this question would be "an opinion advising what the law would be upon a hypothetical state of facts," which this Court has no power to issue. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937); *Maritime Overseas Corp. v. NLRB*, 955 F.2d 212, 223 (4th Cir. 1992). To avoid any future misunderstanding on this point, we submit that, if the Court elects to publish its memorandum opinion in this case, the paragraph quoted above should be deleted.

Very truly yours,

Aileen A. Armstrong
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
202/273-2960

By: /s/ David A. Fleischer
David A. Fleischer,
Senior Attorney

cc:

Robert Dunlap II,
Acting Attorney General
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OFFICE OF THE ATTORNEY GENERAL
CIVIL DIVISION

August 21, 1997

Ms. Cathy A. Catterson, Esq.
Clerk
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1526

Re: *Saipan Hotel Corporation v. NLRB*, Nos. 96-70403, 70483

Dear Ms. Catterson:

Please transmit this letter to the panel that decided the above-referenced cases: Judges Norris, Hall, and Tashima.

This letter is in response to the August 15, 1997 letter of the National Labor Relations Board ("the Board"). The Board was in turn responding to the Commonwealth of the Northern Mariana Islands' (the CNMI) request that the Court publish its memorandum opinion in the above-referenced cases in accordance with Circuit Rule 36-2(e) and 36-4.

In its August 15th letter, the Board asked the Court to delete language from the memorandum opinion if the Court elects to publish it. In essence, the Board is asking the Court to revise its opinion without having moved the

Court to clarify, rehear, or reconsider the order of the Court in accordance with Circuit rule 27-1 (3) and 27-10. The Board failed to move for clarification, rehearing, or reconsideration within the requisite 14 days because the Court did not "overlook[] or misunder[stand] a point of law or fact," nor was there any "change in legal or factual circumstances after the order which would entitle the movant to relief." Circuit Advisory Committee Note to Rule 27-10. The Board is now seeking to do by response to the CNMI's request to have the opinion of the Court published that which it did not properly attempt by motion.

The CNMI respectfully renews its request to have the opinion published and asks the Court to refrain from modifying its opinion without benefit of a timely motion for clarification, rehearing, or reconsideration.

Thank you for your attention to this matter.

Very truly yours

/s/ Robert Dunlap (N.J.G.)
Robert Dunlap II
Attorney General (Acting)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing letter of the Commonwealth of the Northern Mariana Islands was this 21st day of August, 1997, served via facsimile and / or first-class mail, postage prepaid, upon the following:

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/s/ Robert Dunlap (N.J.G.)
Robert B. Dunlap II

[logo] **UNITED STATES GOVERNMENT**
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

August 28, 1997

Cathy A. Catterson, Esq.
Clerk, United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Nos. 96-70403, 96-70483 – *Saipan Hotel Corp. v. NLRB*
(9th Cir.)
Board Case Nos. 37-CA-3977 et al

Dear Ms. Catterson:

Please transmit this letter to the panel that decided the above cases: Circuit Judges Norris, Hall, and Tashima.

The National Labor Relations Board ("the Board") responds as follows to the August 21, 1997, letter of amicus curiae, the Commonwealth of the Northern Mariana Islands ("the CNMI"). The Board did not file a timely motion to modify this Court's memorandum opinion in these cases because, as the memorandum opinion itself expressly states (p. 1, fn. *), it is not intended for publication and cannot be cited in any future case. However, the CNMI has now requested publication of the memorandum opinion. This request, if granted, would enable the CNMI or any party to rely, in future cases, on the language quoted in the Board's August 15 letter. The Board submits that the request for publication and the potential consequences thereof constitute a "change in legal or factual circumstances after the order" warranting

an otherwise untimely request for modification of the memorandum opinion. Accordingly, the Board renews its request in the August 15 letter that the paragraph quoted therein be deleted from the memorandum opinion if, and only if, the Court decides to publish that opinion.

Very truly yours,
Aileen A. Armstrong
Deputy Associate General Counsel
National Labor Relations Board

By /s/ David A. Fleischer
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Senior Attorney

cc: Robert Dunlap II
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(2)

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 97-720

In the Supreme Court of the United States

OCTOBER TERM, 1997

SAIPAN HOTEL CORPORATION
DBA HAFADAI BEACH HOTEL,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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35 pp

QUESTIONS PRESENTED

Petitioner operates a luxury hotel and restaurants in the Commonwealth of the Northern Mariana Islands (CNMI). Petitioner employs "resident" and "nonresident" workers, as defined by CNMI law. The questions presented are:

1. Whether the National Labor Relations Board reasonably concluded that it has statutory jurisdiction over petitioner's nonresident workers pursuant to Section 2(3) of the National Labor Relations Act.

2. Whether the Board acted within its remedial authority in ordering petitioner to reinstate with backpay 21 nonresident workers, against whom petitioner was found to have discriminated because of their protected union activity, in violation of Section 8(a)(3) and (1) of the Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-720

SAIPAN HOTEL CORPORATION
DBA HAFADAI BEACH HOTEL,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 96-70076 (Pet. App. 1-14) is reported at 114 F.3d 994. The opinion of the court of appeals in No. 96-70403 (Pet. App. 15-20) is unpublished, but the judgment is noted at 116 F.3d 485 (Table). The decisions and orders of the National Labor Relations Board (App., *infra*, 1a-10a; Pet. App. 58-83) are reported at 320 N.L.R.B. 192 and 321 N.L.R.B. 116. The decision of the Board in the representation proceeding (Pet. App. 89-147) is not reported.

JURISDICTION

The judgments of the court of appeals were entered on June 12, 1997. Petitions for rehearing were denied on July 28, 1997. Pet. App. 148-151. The petition for a writ of certiorari was filed on October 27, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 2(3) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 152(3), provides, in pertinent part, that "[t]he term 'employee' shall include any employee." Section 7 of the Act, 29 U.S.C. 157, provides, in pertinent part, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

Section 502(a)(2) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant) provides: "The following laws of the United States * * * will apply to the Northern Mariana Islands[:] * * * those laws * * * which are applicable to Guam and which are of general application to the several States as they are applicable to the several States." 48 U.S.C. 1801 note. Section 503(a) of the Covenant provides: "The following laws of the United States * * * will not apply to the Northern Mariana Islands[:] * * * the immigration and naturalization laws of the United States." *Ibid.* It is settled law, as petitioner concedes, that the NLRA

applies to the Northern Mariana Islands. See Pet. App. 6, 97; *Micronesian Telecommunications Corp.* v. *NLRB*, 820 F.2d 1097, 1100-1101 (9th Cir. 1987).

2. Petitioner operates a luxury hotel and restaurants in Garapan, on the island of Saipan, Commonwealth of the Northern Mariana Islands (CNMI). Pet. App. 89-90 n.1, 94. In November 1994, the Commonwealth Labor Federation (Union) filed a representation petition with the National Labor Relations Board (NLRB or Board) requesting that the Board conduct an election to determine whether the Union should be certified as the collective bargaining representative for a bargaining unit consisting of all petitioner's eligible employees. *Id.* at 26, 90-91 & n.2.[1] At the time that the Union filed its representation petition, petitioner employed 47 "resident" and 94 "nonresident" workers. *Id.* at 94.

The terms "resident" and "nonresident" derive from a CNMI statute known as the Nonresident Workers Act (NWA), 3 N. Mar. I. Code §§ 4411 *et seq.*, an immigration law regulating nonresident workers in the CNMI. Pet. App. 95-96, 104. "Resident" workers include United States citizens and the indigenous population of the CNMI. *Id.* at 6, 96, 174. "Nonresident" workers include nonimmigrant, alien contract workers. *Id.* at 6, 173. Under the NWA, "resident" workers shall "be given preference in employment" in the Commonwealth, and "nonresident" workers "shall be employed only as necessary to supplement the available labor force." *Id.* at 105; see also *id.* at 171, 175. The NWA seeks to ensure

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[1] In January 1995, the petition was amended to include Local 5, Hotel Employees and Restaurant Employees, AFL-CIO, as joint petitioner.

that "any necessary employment of nonresident workers in the Commonwealth not impair the wages and working conditions of resident workers." *Id.* at 105, 171. The NWA establishes a procedure through which an employer is required to obtain approval from the CNMI government before hiring a nonresident worker. *Id.* at 107-115.[2]

The NWA provides that employment of nonresident workers "should be temporary and generally limited to the duration of the specific job or employment for which the alien was recruited." Pet. App. 105, 171. However, the NWA places no limit on the length of time that a nonresident worker may remain in the CNMI, provided he or she is employed pursuant to its requirements. *Id.* at 114. In fact, due to "the obvious lack of sufficient numbers of residents to occupy available positions in Saipan," most of petitioner's nonresident workers have been employed by petitioner for two to six years, and some have been employed by petitioner for ten years. *Id.* at 94-95, 133

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[2] Under the NWA, an employer wishing to hire a nonresident worker must first notify CNMI's Chief of Labor (Labor) about the job vacancy. If Labor is unable to refer a resident worker for the job, the employer must advertise the position. Pet. App. 107-108. If Labor finds that no resident worker is available to fill the vacancy, the employer may submit an application to employ a nonresident worker with Labor. *Id.* at 108. Once the employer's application is approved, it must submit the nonresident worker's employment contract to Labor for approval. *Id.* at 110. Approval of nonresident workers' employment contracts by Labor is routine and ministerial in nature. *Id.* at 132. Once the employment contract is approved, Labor issues a "Nonresident Worker Certificate," which is effective for one year. *Id.* at 113. Annual renewal of the certification, however, is routine and generally granted. *Id.* at 133. See generally *id.* at 178-199.

n.54. All of petitioner's nonresident workers are lawfully authorized, pursuant to the NWA, to work in the CNMI. *Id.* at 20.

In response to the Union's representation petition, petitioner conceded before the Board that its resident workers fall within the Board's statutory jurisdiction because they are "employees" within the meaning of Section 2(3) of the Act. Pet. App. 97, 116. However, petitioner contended that application of the Act to its nonresident workers would conflict with "the legislative control the CNMI exercises over the nonresident workers through the [NWA]" (*id.* at 97) and interfere with CNMI's "sovereignty over immigration" (*id.* at 117).

3. a. On March 23, 1995, the Board's Regional Director (RD) issued a decision rejecting petitioner's contentions and ruling that the Board has statutory jurisdiction over petitioner's nonresident workers. Pet. App. 115-120. The RD observed that "Congress clearly expressed its affirmative intention of applying the [NLRA] to the Northern Mariana Islands." *Id.* at 116 (quoting *Micronesian Telecommunications Corp.*, 273 N.L.R.B. 354, 356 (1984), subsequent order, 279 N.L.R.B. 1114 (1986), enforced, 820 F.2d 1097 (9th Cir. 1987)). The RD concluded that "there is no conflict between the Act and CNMI's immigration law as codified in the [NWA]," and that, accordingly, "application of the Act to the nonresident workers will not interfere with the CNMI's 'sovereignty over immigration.'" *Id.* at 117.

In reaching that conclusion, the RD explained that, in *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), this Court "clearly established * * * that alien workers, including undocumented, illegal alien workers, employed in the United States are entitled to the Act's

protections" because those workers, regardless of their immigration status, are "employees" within the meaning of Section 2(3) of the Act. Pet. App. 118. The RD noted in particular the following passage from this Court's decision "because it is also applicable to the instant case" (*ibid.*):

> [A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.

Id. at 118-119 (quoting *Sure-Tan*, 467 U.S. at 892) (footnote and citation omitted).

Although petitioner's nonresident workers are not illegal aliens but rather lawfully reside and work in the CNMI, the RD found that there was "no reason not to apply the holding and the reasoning in *Sure Tan* to the nonresident workers." Pet. App. 119. The RD noted that "the purpose and policy of the NWA [are] that residents be given preference in employment and that 'any necessary employment of nonresident workers in the Commonwealth not impair the wages and working conditions of resident workers.'" *Ibid.* The RD explained that "providing the nonresident workers with the same rights as the

resident workers to participate in union activities * * * assures that there will not be created a 'subclass of workers without a comparable stake in the collective goals' of the resident co-workers, thereby protecting the terms and conditions of employment of the resident workers." *Id.* at 120 (quoting *Sure-Tan*, 467 U.S. at 892).

The RD also observed that, in *Sure-Tan*, the Court determined that "enforcement of the Act with respect to undocumented alien employees is compatible with" the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a primary purpose of which is to "preserve jobs for American workers" and to admit immigrant aliens to work in the United States "only if they 'will not adversely affect the wages and working conditions of the workers in the United States similarly employed.'" Pet. App. 119 (quoting 8 U.S.C. 1182(a)(14) (1988)). The RD explained that "application of the [NLRA] helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment," and, "[i]f an employer realizes that there will be no advantage under the Act in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened." *Ibid.* For similar reasons, the RD concluded, application of the Act to nonresident workers in the CNMI would likewise promote the NWA's "purpose and policy" to grant employment preference to CNMI residents and to assure that employment of nonresidents will not impair the wages and working conditions of resident workers. *Ibid.* The RD also noted that CNMI has enacted legislation "protecting the rights of employees to bargain

collectively regarding their wages," and that that legislation "covers all employees, and does not exclude nonresident workers." *Id.* at 120.

Having concluded that petitioner's nonresident workers fall within the Board's statutory jurisdiction, the RD further found that, because the nonresident and resident workers share a "community of interest" with respect to their terms and conditions of employment, a unit consisting of both groups of employees is appropriate for the purposes of collective bargaining. Pet. App. 143-145. Accordingly, the RD directed that an election be conducted in that unit. *Id.* at 145-146.

b. On April 28, 1995, the Board denied petitioner's request for review of the RD's decision. Pet. App. 88.[3] On July 14, 1995, the Board conducted an election among petitioner's resident and nonresident employees. The Union won the election and was certified as the employees' bargaining representative. App., *infra*, 6a.

4. a. On August 8, 1995, the Board's General Counsel issued a complaint against petitioner, alleging (among other things) that petitioner had failed to renew the employment contracts of 20 nonresident employees and had refused to rehire nonresident employee Vincente Perez, in retaliation for their support of the Union, in violation of Section 8(a)(3)

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[3] Notwithstanding the RD's decision and the Board's denial of petitioner's request for review of that decision, petitioner filed an action in federal district court, seeking to enjoin the Board from asserting its jurisdiction over petitioner's nonresident employees. The court denied petitioner's request for injunctive relief and dismissed the suit. See *Saipan Hotel Corp.* v. *NLRB*, No. 95-0012, 1995 WL 583631 (D.N. Mar. I. June 9, 1995), reprinted at Pet. App. 23-33.

and (1) of the Act, 29 U.S.C. 158(a)(3) and (1). Pet. App. 58, 67-68.[4] On September 29, 1995, the Board's General Counsel issued a second complaint against petitioner, alleging that it had refused to bargain with the Union and had refused to provide the Union with relevant requested information, in violation of Section 8(a)(5) and (1) of the Act. App., *infra*, 1a. Petitioner defended against the complaints on the ground that the Board lacked jurisdiction over its nonresident employees. Pet. App. 17, 59-60; App., *infra*, 2a.

b. On December 19, 1995, the Board issued a decision finding that petitioner had unlawfully refused to bargain with the Union and to provide it with relevant requested information, as alleged in the September 1995 complaint. App., *infra*, 1a-10a (*Saipan Hotel I*). The Board ordered petitioner to bargain with the Union and to provide it the requested information. *Id.* at 7a-9a. On May 1, 1996, acting on a stipulated record (see Pet. App. 16-17, 84-87), the Board issued a decision finding that petitioner had unlawfully discriminated against nonresident employees as alleged in the August 1995 complaint. *Id.* at 58-83 (*Saipan Hotel II*). The Board ordered petitioner (among other things) to reinstate with backpay Perez and the other 20 employees, "if necessary applying to the CNMI's Department of Labor and Immigration for entry permits and work authorization for these employees,

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[4] The RD also sought and was granted interim injunctive relief against petitioner in federal district court pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j), in connection with the violations alleged in the August complaint and pending the Board's adjudication of that complaint. See *Miller* v. *Saipan Hotel Corp.*, No. 95-0013, 1995 WL 583499 (D.N. Mar. I. June 9, 1995), reprinted at Pet. App. 34-55.

in accordance with the relevant provisions of the [NWA] and its implementing regulations." *Id.* at 77.

5. a. The court of appeals enforced the Board's order in *Saipan Hotel I*. Pet. App. 1-14. The court concluded that "[t]here is no defensible construction of 'employee' other than that the term applies to both categories of workers at issue here," *i.e.*, to petitioner's resident and nonresident workers alike. *Id.* at 9. The court explained that, "[g]iven that the NLRA applies to the CNMI, and the NLRA does not except nonresident (or alien) employees from its reach, the NLRB necessarily possesses jurisdiction over both resident and nonresident workers." *Ibid.* (citations omitted).

The court of appeals found that reading of the NLRA consistent with the language and intent of the Covenant. The court explained that, under Section 502(a)(2) of the Covenant, "federal statutes apply to the CNMI 'as they are applicable to the several states.'" Pet. App. 9. "Because the NLRA, as it is applied in the United States, does not distinguish between citizen and alien employees," the court concluded, "neither can the NLRA be applied in the CNMI to distinguish between resident and nonresident workers." *Ibid.*

The court of appeals also concluded that "application of the NLRA to the CNMI's nonresident workers does not contravene the statutory preference for resident workers expressed in the NWA because there is no necessary conflict between the NWA and the NLRA." Pet. App. 9. The court explained that "[t]he NWA's twin purposes—to protect residents' job security by giving them preferences in employment and to ensure that nonresidents' employment will not disadvantage residents' wages and working conditions

—are essentially the same as the purposes of the United States' immigration laws"; and, "as the Court recognized in *Sure-Tan*, bringing alien workers within the ambit of the NLRA ensures that citizen workers' economic interests will be better protected." *Id.* at 9-10 (citation omitted). Finally, the court of appeals held that "the shared common interests of the nonresident and resident workers fully justify the NLRB's determination that they should constitute a single bargaining unit." *Id.* at 13.

b. The court of appeals also enforced the Board's order in *Saipan Hotel II* in a separate, unpublished memorandum opinion. Pet. App. 15-20. The court rejected the contention that the Board's remedial order with respect to the 21 employees against whom petitioner had discriminated in that case "forced [petitioner] into a Hobson's Choice between violating the terms of the NLRB's order or violating the CNMI's laws." *Id.* at 17. To the contrary, the court of appeals held that the Board's order "did not in any way require [petitioner] to violate CNMI law, as codified in the NWA." *Id.* at 19. The court explained that the Board's reinstatement order "require[s] that [petitioner] obtain for the nonresident workers work authorizations and reentry permits in accordance with the NWA." *Ibid.* Moreover, the court of appeals noted, the CNMI government conceded before the court that petitioner "was able to reinstate 20 of the 21 * * * workers without violating the NWA." *Ibid.* The court further found that "the NLRB offers a workable solution for the 21st worker," Vincente Perez. *Ibid.*[5]

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[5] Regarding Perez, in the court of appeals, Board counsel suggested that, "in the single instance in which [petitioner] was

The court of appeals also rejected the contention that "the NLRB's requirement that [petitioner] give the nonresident discriminatees backpay violates *Sure-Tan*." Pet. App. 19. The court of appeals explained that, "[i]n *Sure-Tan*, the Court held that employees could only receive backpay for periods during which they were 'lawfully entitled to be present and employed in the United States.'" *Ibid.* (quoting *Sure-Tan*, 467 U.S. at 903). The court of appeals found that, unlike the workers in *Sure-Tan*, the employees here were legally present and "lawfully entitled to work in the CNMI." *Id.* at 20. Because "*Sure-Tan* did not preclude legal aliens in the United States from receiving backpay or reinstatement," the court concluded that "the nonresident workers here were entitled to the full benefit of any remedies the NLRB was authorized to order." *Ibid.*

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with any decision of this Court or the decision of any other court of appeals. Review by this Court is therefore not warranted.

1. In *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), this Court held that undocumented aliens are "employees" within the meaning of that term in the NLRA. The Court reasoned that its decision was

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faced with an apparent conflict between a replacement resident and a nonresident discriminatee who vied for the only position within a job category, [petitioner] could have created a second, substantially similar position for the nonresident worker, and maintained the replacement resident worker on its payrolls as well." Pet. App. 18; see NLRB C.A. Br. at 42, *Saipan Hotel II* (Nos. 96-70403, 96-70483).

consistent with the then-current INA, because the INA did not make it unlawful for an employer to hire an undocumented alien. *Id.* at 892-893. Petitioner errs in contending (Pet. 11-14) that the court of appeals' holding in *Saipan Hotel I* that petitioner's nonresident workers are likewise "employees" under the NLRA is inconsistent with *Sure-Tan*. As the court of appeals found, petitioner's nonresident employees are "lawfully entitled to work in the CNMI." Pet. App. 20. Thus, the holding of the court of appeals is fully consistent with this Court's reasoning in *Sure-Tan*.

Petitioner nonetheless contends (Pet. 11) that, "unlike the [INA at the time of] *Sure-Tan*, the [NWA] is irreconcilable with the [NLRA]" for several reasons. First, petitioner argues (Pet. 14) that the Board's determination that petitioner's resident and nonresident employees share a "community of interest" that makes them an appropriate unit for collective bargaining (Pet. App. 143-145) conflicts with the NWA's preference for resident employees. The NWA does not provide, however, that nonresident workers who have been authorized to work in the CNMI cannot be included in bargaining units along with their resident co-workers.

In this case, the Board applied well-settled criteria to the specific working conditions of petitioner's resident and nonresident employees and reasonably found that one bargaining unit is appropriate. The Board expressly acknowledged that the resident and nonresident workers' employment conditions differ in a few respects due to "the requirements contained in the NWA." Pet. App. 144-145. The Board concluded, however, that those differences are not "sufficient to outweigh the overwhelming evidence * * * which

demonstrates the community of interest existing between the resident and nonresident employees." *Id.* at 145.[6] The Board's fact-bound determination, which was upheld by the court of appeals (*id.* at 13), raises no issue warranting this Court's attention. See *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947) ("The issue as to what unit is appropriate for bargaining * * * involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed.").

Second, petitioner contends (Pet. 14) that "application of the NLRA to nonresidents would enable nonresident workers to bargain for permanent employment," which "would clash directly with the NWA requirements that nonresident employment contracts be limited to one year." The hypothetical scenario posited by petitioner is not presented by this case, however. The Union has not negotiated contract

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[6] Thus, the Board found that, although petitioner "maintains different health insurance policies, and provides certain additional benefits for the nonresident employees as compared to its resident employees," nonetheless, both groups of employees "work side by side in the same geographical work locations, share common supervision, similar hours of work and shifts," "are hired, trained and supervised by the same department heads," "work in the same job classifications, with essentially the same or similar job duties and assignments," "receive the same or similar wage rates, including bonuses, annual pay increases and overtime," and are subject to the "same factors" in regard to discharge. Pet. App. 144. See also *Dredge Operators, Inc.*, 309 N.L.R.B. 984, 984-985 & n.2 (1992) (unit consisting of all seamen employed aboard a U.S. flag vessel was appropriate for bargaining, notwithstanding that, subsequent to the union's certification, the government of Hong Kong required the employer to hire Hong Kong citizens, in addition to its American workers), enforced, 19 F.3d 206 (5th Cir. 1994).

terms granting petitioner's nonresident workers "permanent employment." Rather, petitioner, in violation of the Act, has refused to bargain with the Union about employment terms altogether. See App., *infra*, 6a-7a. In any event, petitioner's hypothetical case is based on the incorrect factual premise that a nonresident worker cannot lawfully work in the CNMI for more than one year. The length of tenure of petitioner's own nonresident workers, most of whom have worked for petitioner two to six years (Pet. App. 133 n.54), refutes that premise. The NWA places no limit on the length of time that a nonresident worker may remain in the CNMI provided his or her employment contract has been approved by the CNMI government, which "routine[ly] and generally" grants applications for annual renewal of those contracts. *Id.* at 114, 133.

Third, petitioner argues (Pet. 15) that "the NLRB reinstatement order in [*Saipan Hotel II*] is irreconcilable with the resident preference under the NWA." The Board's order, however, is wholly consistent with the NWA. The Board required that petitioner offer the employees against whom it discriminated "reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions * * * if necessary applying to the CNMI's Department of Labor and Immigration for entry permits and work authorizations for these employees, *in accordance with the relevant provisions of the [NWA].*" Pet. App. 77 (emphasis added).

Petitioner complains (Pet. 15 & n.8), however, that the Board's order inappropriately requires petitioner to maintain a "'double-hire' situation," *i.e.*, to "(a) offer a substantially similar position or create a new position for each nonresident; *and*, (b) at the same

time, offer that position to each and every qualified resident applicant until the entire resident pool was exhausted." That complaint is not supported by the record. The CNMI government conceded in the court of appeals that petitioner "was able to reinstate 20 of the 21 * * * workers without violating the NWA." Pet. App. 19. There is no indication in the record, nor does petitioner allege before this Court, that, in order to reinstate those 20 workers consistently with the NWA, petitioner was required to create a second set of 20 similar jobs and fill them with resident workers. Rather, as the court of appeals noted, a "double hire" situation might be presented only in the case of "the 21st worker," Perez, and then only if his former position were presently occupied by a resident worker and no vacancies in his job category existed. *Id.* at 18-19.

Even as to Perez, however, the Board's order does not necessarily require petitioner to "double hire." Rather, the Board suggested, in its brief in the court of appeals, that one way (among others) that petitioner could satisfy its remedial obligation in the event that resident workers currently held all the available positions within Perez's former job category would be to create an additional position and offer that position to Perez if no qualified resident worker applied for it. See NLRB C.A. Br. at 42, *Saipan Hotel II* (Nos. 96-70403, 96-70483); Pet. App. 18. Although the court of appeals found that proposal to be a "workable solution" (Pet. App. 19), the Board's order does not *compel* petitioner to adopt the proposal. It requires only that petitioner reinstate Perez to his former or a substantially equivalent position "in accordance with the relevant provisions of the [NWA]." See *id.* at 77. The precise manner in which

petitioner satisfies its remedial obligation is a matter to be determined in compliance proceedings, where the Board "tailor[s] the remedy to suit the individual circumstances of each discriminatory [action]." *Sure-Tan*, 467 U.S. at 902.[7]

2. Nor is there merit in petitioner's contention (Pet. 16-19) that the court of appeals' decision in *Saipan Hotel II*, upholding the reinstatement and backpay remedy fashioned by the Board for the 21 employees against whom petitioner discriminated, is inconsistent with the remedial holding of *Sure-Tan*. In *Sure-Tan*, this Court held that reinstatement of illegal alien employees who were no longer present in the United States must be "condition[ed] * * * on the employees' legal reentry," and, further, that, "in computing backpay, the employees must be deemed 'unavailable' for work * * * when they were not lawfully entitled to be present and employed in

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[7] Petitioner mischaracterizes the district court's decision in the Section 10(j) proceeding in suggesting (Pet. 15 n.7) that "[t]he NLRB 'reinstatement' demand for Vincente Perez so fundamentally violates the CNMI's plenary authority over immigration" that the court "chose instead to place Perez on a preferential list from which he would be hired only if no qualified resident worker applied for the position." The district court did not rule that the "double hire" proposal, described in the text above, would violate CNMI law. See Pet. App. 34-55. The district court did not pass on that proposal, because the Board's Regional Director did not request that remedy at the interim injunction stage. See *id.* at 49-50 & n.4. Moreover, the relief ordered by the district court on behalf of Perez is consistent with the "double hire" proposal. Each conditions Perez's reinstatement to a storekeeper position on the unavailability of a qualified resident worker to fill the vacancy. Compare NLRB C.A. Br. at 42, *Saipan Hotel II* (Nos. 96-70403, 96-70483), with Pet. App. 54.

the United States." 467 U.S. at 903. That holding, however, has no bearing on this case, because the 21 nonresident employees granted relief by the Board's order are not illegal aliens in the CNMI. Rather, as the court of appeals observed, those workers are legally present and "lawfully entitled to work in the CNMI." Pet. App. 20. They are thus "entitled to the full benefit of any remedies the NLRB was authorized to order." *Ibid.*

Petitioner errs in suggesting (Pet. 16) that the nonresident workers should nonetheless be treated as if they were illegal aliens because their "temporary employment contracts had expired and [they] consequently had no authorization to be present or employed in the CNMI." That suggestion conflicts with the express holding of the court of appeals that the workers are entitled to be present and to work in the CNMI. See Pet. App. 20. It conflicts with the fact that petitioner has already reinstated all but one of the employees consistent with the NWA. *Id.* at 19. And it also ignores the Board's finding that the reason the workers' contracts expired in the first place was that petitioner unlawfully refused to renew the contracts with the CNMI authorities. *Id.* at 67.[8]

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[8] Petitioner incorrectly contends (Pet. 15 n.8) that, "pursuant to stipulation, unfair labor practices were never established nor litigated on the merits" in *Saipan Hotel II*. The court of appeals properly rejected that contention, ruling instead that the stipulation in that case "plainly provides that the parties submitted the case, in its entirety, for decision by the NLRB," that "the complaint, which was incorporated into the stipulation * * *, alleged that [petitioner] had committed acts that violated the NLRA," and that "[petitioner] merely 'denie[d] the commission of any unfair labor practices'—and withdrew its answer explaining that position," preserving only "its

Petitioner also errs in asserting (Pet. 17-19) that the court of appeals' decision upholding the Board's remedial award conflicts with the decisions of other circuits. Unlike the present case, the cases on which petitioner relies involve application of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, which amended the INA to make it unlawful to hire undocumented aliens, see 8 U.S.C. 1324a(a). At issue in those cases is whether that change in the INA alters the import of this Court's holding in *Sure-Tan* for aliens who are illegally present and unauthorized to work in the United States. As explained above, the decision of the court of appeals in this case was based on an express finding that petitioner's workers are both lawfully present and entitled to work in the CNMI.

3. Finally, petitioner contends (Pet. 19-28) that the court of appeals in *Saipan Hotel I* improperly deferred to the Board's interpretation of the NWA and ignored the provisions of the Covenant in concluding that the Board possessed statutory jurisdiction over its nonresident workers. Petitioner's contentions, however, are based on a mischaracterization of the decision of the court of appeals. That court did not "defer" to the Board's interpretation of the NWA. Rather, reviewing the NWA *de novo*, the court correctly concluded, as had the Board, that "application of the NLRA to the CNMI's nonresident workers does not contravene the statutory preference for resident workers expressed in the NWA because there is no necessary conflict between the NWA and

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defenses relating to the NLRB's assertion of jurisdiction." Pet. App. 17; see also *id.* at 84-87.

the NLRA." Pet. App. 9.[9] Nor did the court of appeals ignore the provisions of the Covenant. Rather, the court properly concluded that the Covenant supported the Board's assertion of jurisdiction, because Section 502(a)(2) of the Covenant makes "federal statutes apply to the CNMI 'as they are applicable to the several states,'" and "the NLRA, as it is applied in the United States, does not distinguish between citizen and alien employees." *Ibid.*

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[9] Because the court of appeals did not defer to the Board's interpretation of the NWA, there is also no merit to petitioner's claim (Pet. 21-22) that the court's decision conflicts with the holdings of other courts of appeals declining to defer to an agency's interpretation of a statute that it has not been charged to administer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1997

APPENDIX A

NATIONAL LABOR RELATIONS BOARD

Case 37-CA-4202

SAIPAN HOTEL CORPORATION,
D/B/A HAFADAI BEACH HOTEL AND HOTEL EMPLOYEES
& RESTAURANT EMPLOYEES,
LOCAL 5, AFL-CIO AND COMMONWEALTH LABOR
FEDERATION

December 19, 1995

DECISION AND ORDER

By Members BROWNING, COHEN, and TRUESDALE

Pursuant to a charge filed by Hotel Employees & Restaurant Employees, Local 5, AFL-CIO and Commonwealth Labor Federation, the Union, on August 29, 1995, the General Counsel of the National Labor Relations Board issued a complaint on September 29, 1995, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to furnish necessary and relevant information following the Union's certification in Case 37-RC-3687. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an

answer admitting in part and denying in part the allegations in the complaint.

On October 30, 1995, the General Counsel filed a Motion for Summary Judgment and memorandum in support. On November 1, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On December 4, 1995, the General Counsel filed a further brief in support of the motion for summary judgment, and on December 6, 1995, the Respondent filed a brief in opposition to the motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and response the Respondent admits its refusal to bargain and to furnish information, but attacks the validity of the Union's certification on the basis of its arguments in the representation proceeding that the Board lacks jurisdiction over this matter and that the unit is inappropriate because it includes both nonresidents and residents.[1]

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[1] The Respondent has not specifically asserted as a defense in the instant proceeding certain additional objections it filed to conduct allegedly affecting the results of the election in the representation proceeding. In any event, we find that the Respondent is barred from doing so inasmuch as it failed to file a request for Board review of the Regional Director's supplemental decision overruling the additional objections. See *A. Bonfatti & Co.*, 316 NLRB 623 fn. 1 (1995), and cases cited there.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[2] We therefore find that the Respondent

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[2] In his March 23, 1995 Decision and Direction of Election, which the Board effectively affirmed by order dated April 28, 1995, the Regional Director applied by analogy the principles and standards set forth in *Res Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986), and found that the Board had jurisdiction over the Respondent's nonresident workers under those principles and standards inasmuch as the Employer retained sufficient control over essential terms and conditions of employment of its nonresident workers to enable it to engage in meaningful bargaining. Although the Board, Member Cohen dissenting, subsequently overruled the *Res Care/Long Stretch* line of cases in its July 18, 1995 decision in *Management Training Corp.*, 317 NLRB 1355 (1995), the Board thereby effectively broadened rather than restricted its jurisdiction. Thus, *Management Training* holds that, in determining whether to assert jurisdiction, "the Board will only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards." 317 NLRB at 1358. Accordingly, we find that the Board's decision in *Management Training* provides no basis for reconsidering the Regional Director's jurisdictional findings. Further, "absent special circumstances, the Board has traditionally applied the pronouncement of a new rule of law to the case in which it arose and to all pending cases." *Hickman Harbor Service*, 266 NLRB 476, 477 (1983), enfd. in pertinent part 739 F.2d 214 (6th Cir.1984). We shall, therefore, apply the rule of law expressed in *Management Training* to the present case, and

has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no issues requiring a hearing with respect to the Union's request for information. The Union requested the following information from the Respondent:

1. Name, age, classification, wage rate, red-circle rate (if any), and seniority dates of each covered employee.

2. Weighted Average Wage Rate.

3. Total compensable hours per month for the past year.

4. Total cost, on a compensable hour basis, of use for each benefit (sick leave, vacation pay, holiday pay, funeral leave, overtime, etc.).

5. Cost per employee per month for the medical, dental, drug, and vision plans and any co-payment required of any employee.

6. Cost per employee per month for any retirement plans.

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we find that it provides an additional basis for asserting jurisdiction.

Member Cohen adheres to his dissenting position in *Management Training*. Further, he does not reach the retroactivity issue, and would assert jurisdiction on the basis cited by the Regional Director.

7. Cost per employee for any other benefits: e.g. housing, meals, etc.

Although the Respondent in its answer states that it is without knowledge or information sufficient to form a belief as to whether the foregoing information is necessary and relevant, it is well established that such employee, wage, and benefit information is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Tire America*, 315 NLRB 197 (1994); and *Holiday Inn Coliseum*, 303 NLRB 367 (1991).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation of the Commonwealth of the Northern Mariana Islands (CNMI), with an office and place of business located in Garapan, on the Island of Saipan, CNMI, has been engaged in the operation of a hotel and restaurants. During the calendar year ending December 31, 1994, the Respondent, in conducting its operations, derived gross revenues in excess of $500,000 and purchased and received at its Garapan, Saipan, CNMI facility, goods and materials valued in excess of $5000, which originated from points outside the CNMI.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held July 14, 1995, the Union was certified on August 25, 1995, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All employees of the Employer employed in the CNMI excluding all managers, professional and confidential employees, guards and supervisors as defined in the Act. The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

About August 28, 1995, the Union requested the Respondent to bargain and to furnish relevant and necessary information, and, since about the same

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[3] Although the Respondent in its answer states that it is without knowledge or information sufficient to form a belief as to whether the Union is a 2(5) labor organization, the Respondent stipulated to the Union's 2(5) labor organization status in the underlying representation proceeding. Accordingly, we find that the Respondent is precluded from litigating the issue in this proceeding. See *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 1 (1992), and cases cited there.

date, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after August 28, 1995, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union requested necessary and relevant information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir.1964), cert. denied 379 U.S. 817 (1964); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir.1965).

ORDER

The National Labor Relations Board orders that the Respondent, Saipan Hotel Corporation, d/b/a Hafadai Beach Hotel, Saipan, Commonwealth of the Northern Mariana Islands, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Hotel Employees & Restaurant Employees, Local 5, AFL-CIO, and Commonwealth Labor Federation, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All employees of the Employer employed in the CNMI excluding all managers, professional and

confidential employees, guards and supervisors as defined in the Act.

(b) Furnish the Union the information that it requested on August 28, 1995.

(c) Post at its facility in Saipan, Commonwealth of the Northern Mariana Islands, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 20 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Hotel Employees & Restaurant Employees, Local 5, AFL-CIO and Commonwealth Labor Federation, as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All employees employed by us in the CNMI excluding all managers, professional and confidential employees, guards and supervisors as defined in the Act.

WE WILL furnish the Union the information that it requested on August 28, 1995.

SAIPAN HOTEL CORPORATION, d/b/a
HAFADAI BEACH HOTEL

(3)

Supreme Court, U.S.
FILED
JAN 8 1998
CLERK

No. 97-720

In The

Supreme Court of the United States

October Term, 1997

SAIPAN HOTEL CORPORATION
dba HAFADAI BEACH HOTEL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The National Labor Relations Board (NLRB) continues to ignore the legal issue presented throughout the course of the underlying related cases, and fails to recognize the significance of the *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, and for other purposes* (Covenant), which is the operative governing document that delineates the political relationship between the United States and the Commonwealth of the Northern Mariana Islands (CNMI). The NLRB's arguments warrant the following brief reply.

1. The NLRB attempts to characterize the cases before this Court as a "factual" dispute between Hafadai and the NLRB. This is not so. The purely legal issue before this Court involves a jurisdictional struggle between the CNMI and the NLRB. The CNMI has sovereign immigration authority pursuant to Covenant section 503(a) and has manifested that authority in the Nonresident Workers Act (NWA). The NLRB claims jurisdiction over nonresidents through Covenant section 502(a)(2), which makes laws generally applicable in Guam and the States – such as the National Labor Relations Act (NLRA) – applicable to the CNMI. The important legal question presented is whether, under the terms of the Covenant, the NLRB has jurisdiction over nonresident workers in the CNMI. The application and reconciliation of the NWA and the NLRA in the CNMI requires statutory construction of the Covenant itself. See Covenant, Petition App. 152-168. This issue was presented to the NLRB from the inception of the cases below. Throughout the course of

the proceedings, the NLRB has continued to ignore this legal issue, and continues to ignore it in its opposition.

The NLRB's position that there is no conflict between the NLRB and the NWA is purely an attempt to mask the present struggle between two government agencies – the NLRB and the CNMI Department of Labor – who both claim control over nonresident workers in the CNMI. To maintain that there is no conflict between the NLRA and the NWA is to ignore the entire record below, the continuing battle between the NLRB and the CNMI Department of Labor, as well as the presence of, and argument by, the CNMI at oral argument before the Ninth Circuit Court of Appeals.

If there were no conflict between the NLRA and the NWA, then the NLRB and the CNMI Acting Attorney General would not dispute whether the opinions below favor the NLRB or the CNMI. See Petition App. 246-256. If there were no conflict, the CNMI would not need to challenge the NLRB's bargaining unit and remedial orders which confer upon nonresidents the right to permanent employment, in direct contravention of CNMI law mandating only temporary employment. See Amicus Brief of the CNMI, *Saipan Hotel Corp. v. NLRB*, 114 F.3d 994 (CA9 1997) (Nos. 96-70096, 96-70198) (hereinafter "CNMI Amicus Brief") (seeking reversal of the NLRB's infringement upon the CNMI's legislative authority and the abrogation of a power specifically vested in the CNMI by negotiated agreement with the United States). If there were no conflict, Hafadai and other employers in the CNMI would not be placed in a position of having to choose between the laws of separate sovereign governments.

The conflict arises not just from the application of the NLRA and the NWA, but from the purposes and policies underlying the statutes themselves. In its petition, Hafadai described three existing conflicts which illustrate the inherent irreconcilability between the purpose, policies, and remedies of the NLRA and those of the NWA. The NLRB characterizes these examples as "hypothetical" and implies that there are no real conflicts. However, this argument is disingenuous given the admissions made by the NLRB during the course of the underlying proceedings. For example, both the NLRB and the court of appeals below have recognized "the single instance in which [Hafadai] was faced with an apparent conflict between a replacement resident and a nonresident[.]" Petition App. 18-19; Brief in Opp. at 16. The NLRB also has admitted that the NWA's mandatory time limit imposed on a nonresident worker's contract "would be an impermissible intrusion into the collective-bargaining process," and has maintained, without support, that it "would therefore be preempted." Brief for the NLRB at 55, *Saipan Hotel Corp. v. NLRB*, 114 F.3d 994 (CA9 1997) (Nos. 96-70096, 96-70198).

In order to decide this jurisdictional conflict and the legal issues presented, the NLRB and the court of appeals should have applied basic principles of statutory construction to determine, under the Covenant, whether the NLRA or the NWA prevailed. This was not done. Instead, the NLRB ignored the conflict, applied its own Board-made law to impermissibly expand its limited jurisdiction, and essentially gave nonresident workers permanent employment in the CNMI, a status which is expressly prohibited under the NWA. Nevertheless, the

entire record in the cases below and the NLRB's current posture in pending matters in the CNMI contradict the NLRB's contention that no conflict exists between the NLRA and the NWA. The conflict exists; it has resulted in a dispute over which government is in charge of nonresident workers, and Hafadai and other employers are caught in the middle of this dispute. Hafadai respectfully requests that certiorari be granted to resolve this dispute between the two sovereign governments.

2. The NLRB also mischaracterizes the nonresident workers in the cases below as lawfully entitled to work and to be present in the CNMI, and thus, entitled to the NLRB's remedies as set forth in *Sure-Tan, Inc. v. NLRB,* 467 US 883 (1984) (conditioning offers of reinstatement on legal reentry, and, in computing back pay, deeming employees "unavailable" for work during any period when they were not lawfully entitled to be present and employed in the United States). In support of its contention, the NLRB submits that "the reason the workers' contracts expired in the first place was that petitioner unlawfully refused to renew the contracts with the CNMI authorities." Brief in Opp. at 18. This argument is fundamentally flawed in two respects.

First, the NLRB's opposition rests upon the erroneous presumptions that nonresidents have the "right" to permanent employment and that they are "entitled" to a renewal of their temporary contracts. The NLRB's presumptions are in direct conflict with the temporary status of nonresidents mandated under the NWA. The court of appeals below exacerbated these erroneous presumptions by misfocusing on the "unavailability" issue as whether

the nonresidents had *gained entrance* into the CNMI lawfully. See Petition App. 20. If upheld, these presumptions would abrogate the CNMI's ability to control the exit of nonresidents from the CNMI, and *a fortiori*, the immigration matters within its sovereign control, in direct conflict with "the CNMI's sovereign control over its immigration matters." Petition App. 20; see generally, CNMI Amicus Brief.

Second, the NLRB maintains that the nonresident workers were lawfully present in the CNMI by bootstrapping this argument on its claim that the nonresident workers were entitled to renewal of their contracts. This argument must fail because the nonresident workers' legal right to be present in the CNMI cannot be assessed on the basis of an NLRB determination that the nonresident workers were entitled, under the NLRA, to continued employment. The nonresident workers' rights to be legally present in the CNMI is a matter controlled solely by the NWA. Accord *Sure-Tan*, 467 US 883 (1984) (noting that, in devising remedies for unfair labor practices, the NLRB is obliged to take into account the "equally important Congressional objective" of deterring unauthorized immigration that is embodied in the immigration and Nationality Act).

Section 4435(g) of the NWA provides that when a nonresident worker's contract expires, the nonresident is no longer entitled to remain in the CNMI. 3 CMC § 4434(g), Petition App. 186. Therefore, nonresident workers whose contracts have expired are, at the time of the contracts' expiration, not lawfully entitled to work or remain in the CNMI. In fact, in the cases below some nonresident workers had departed the CNMI after their

contracts with Hafadai had expired. The court of appeals upheld the NLRB's order requiring Hafadai to reinstate the workers and, if necessary, to apply for entry permits for the nonresident workers who no longer were present in the CNMI. Petition App. 77.

The CNMI objected to these rulings as conflicting with the NWA, and as infringing upon the CNMI's exclusive authority over immigration. See CNMI Amicus Brief at 9-10. To date, the CNMI has permitted the nonresident workers in the cases below to work in the CNMI only under temporary work authorizations that must be renewed every ninety (90) days until the underlying cases reach a final resolution.

Clearly the facts indicate that *Sure-Tan's* requirement of lawful presence was not always satisfied in the cases below. Accordingly, the remedies upheld by the court of appeals below conflict with this Court's decision in *Sure-Tan*. Even for those nonresident workers who were physically present in the CNMI, the circuit courts of appeals are split regarding *Sure-Tan's* scope of remedial relief, specifically in cases in which employees are not lawfully entitled to work, but are, nonetheless, physically present. Hafadai requests that certiorari be granted to resolve this issue.

3. Lastly, the NLRB argues that the court of appeals did not defer to the NLRB. The decisions below indicate otherwise. The court of appeals failed to conduct a *de novo* inquiry of the Covenant, especially conflicting Covenant sections 502(a)(2) and 503(a), Petition App. 162-163, and thus failed to determine, as a matter of law, whether the NLRA or the NWA applies to nonresident workers.

Instead, the court of appeals deferred to the NLRB's mischaracterization of the central issue as one involving an interpretation of the NLRA. By so deferring, the court of appeals upheld the NLRB's "reasonably defensible" statutory construction of the term "employee" under the NLRA. Petition App. 8. The court of appeals further deferred to the NLRB regarding retroactive applications of its decisions, concluding that the decisions did not work a "manifest injustice." Petition App. 12-13. Moreover, the court of appeals deferred to the NLRB's decision regarding bargaining units as "if not final, . . . rarely to be disturbed." Petition App. 13.

The decisions below fail to demonstrate that the court of appeals conducted a *de novo* review of the Covenant, the NWA, or its implementing regulations. Because the Covenant embodies the agreement between Congress and the CNMI, it should have been examined to determine the extent to which congressional policies, such as the NLRA, should be extended in the CNMI. The court of appeals conducted similar analyses of the Covenant in *CNMI v. Atalig*, 723 F.2d 682 (CA9), (holding that Covenant restrictions on right to jury trial did not violate Sixth and Fourteenth Amendments), *cert. denied*, 467 US 1244 (1984), *Wabol v. Villacrusis*, 958 F.2d 1450 (CA9 1992), (holding that land alienation restrictions in the Covenant did not violate equal protection), *cert. denied*, 506 US 1027 (1992), and *United States v. De Leon Guerrero*, 4 F.3d 749 (CA9 1993) (examining whether Insular Areas Act conflicts with the self-governance provisions of the Covenant). No such analysis was applied in the cases below.

The court of appeals' deferral to the NLRB conflicts with this Court's instructions regarding the proper scope

of deference set forth in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 US 837 (1984) and by courts of appeals interpreting *Chevron*. Because the improper deferential posture of the court of appeals below has allowed the NLRB to dictate immigration policy for a commonwealth in violation of a specific congressional mandate (the Covenant), Hafadai respectfully requests that certiorari be granted to answer this important question and to resolve the split in the circuits over the proper scope of judicial review over agency determinations involving statutes outside the agency's limited scope of expertise.

CONCLUSION

For all of the foregoing reasons, and the reasons stated in the petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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